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No. _____

IN THE

SUPREME COURT

OF THE
UNITED STATES

OCTOBER TERM, 1985

STATE OF WASHINGTON, et al.,

Petitioners,

v.

UNITED STATES, et al.,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI

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QUESTION PRESENTED

Do the treaties of 1854-1855 between the United States and Indian tribes in the Washington Territory require that all artificially propagated (hatchery) fish, irrespective of who is responsible for the production or financing of those fish must be included in the harvestable fishery base which is divided between treaty and non-treaty fishers as required by this court in *Washington v. Washington State Commercial Passenger Fishing Vessel Association,* 443 U.S. 658 (1979)?

PARTIES

Petitioners, State of Washington and Washington State Department of Fisheries and Department of Game, were the appellant in the Court of Appeals.

The State of Washington and its agencies are defendants in the United States District Court for the Western District of Washington in an action commenced in 1970, the plaintiffs being the United States and twenty Indian tribes. The tribes are the Quileute, Makah, Lummi, Muckleshoot, Squaxin Island, Skokomish, Lower Elwha, Stillaguamish, Sauk-Suiattle, Nisqually, Swinomish, Tulalip, Puyallup, Quinault, Upper Skagit, Yakima, Nooksack, Port Gamble Band of Clallam Indians, Hoh, and Jamestown Clallam.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The State of Washington respectfully prays that a writ of certiorari be issued to review the question presented by the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this case on April 29, 1985.

OPINIONS BELOW

The Court of Appeals opinion is reported at ___ F.2d ___, attached as Appendix A. An earlier opinion, reported at 694 F.2d 1374 (December 17, 1984), was withdrawn by the court. The district court opinion, reported at 506 F.Supp. 187 (W.D. Wash. 1980), is attached as Appendix B.

JURISDICTION

The Court of Appeals entered its opinion on April 29, 1985 and this petition for certiorari has been timely filed. Petitioners invoked this court's jurisdiction under 28 U.S.C. § 1254(1).

TREATIES INVOLVED

Six treaties were entered into by the United States with various Indian tribes and bands living in the territory of Washington in 1854 and 1855. Those six treaties contained a provision of which the following is typical:

> "The right of taking fish, at usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, * * * on open and unclaimed lands. Provided however, that they shall not take shellfish from any beds staked or cultivated by citizens."

The six treaties are the Treaty of Medicine Creek, December 26, 1854, 10 Stat. 1132; the Treaty of Point Elliott, January 22, *1855;* 12 Stat. 927; the Treaty with the Makah (Treaty of Neah Bay), January 31, 1855, 12 Stat. 939; Treaty with the Quinault, July 1, 1855, 12 Stat. 971; Treaty with the Yakimas, June 9, 1855, 12 Stat. 951.

STATEMENT OF THE CASE

In 1970, the United States filed an action against the State of Washington in the United States District Court for the Western District of Washington seeking a declaratory judgment and injunctive relief to construe and enforce the fishing rights clause of six Indian treaties of 1854 and 1855 in the territory of Washington. Subsequently, a number of Indian tribes intervened as additional plaintiffs and two state agencies were also added as defendants. Prior to

the trial of that action the district court reserved from trial what would come to be known as the "Phase II environmental and hatchery fish issues." The district court, in 1974, entered a judgment in favor of the plaintiffs. *United States v. Washington*, 384 F.Supp. 312 (W.D. Wash. 1974), affirmed 520 F.2d 676 (9th Cir. 1975), cert. denied 423 U.S. 1086 (1976).

Subsequently, in August, 1976, the plaintiffs filed amended complaints for the environmental phase of litigation. On May 11, 1979, the district court heard arguments on a summary judgment on the environmental issue of "whether the federal treaty fishing right reserves to treaty tribes the right to have the fishery resource protected from adverse environmental actions or inactions of the State of Washington." Shortly thereafter this court rendered its opinion on July 2, 1979 in *Washington v. Washington State Commercial Passenger Fishing Vessel Association, et al.*, 443 U.S. 658, which reviewed and modified the earlier orders entered by the circuit court and district court construing the fishing rights clause of the 1854 and 1855 treaties. In that opinion this court specifically, in footnote 30, *supra* at 688, declined to rule on the status of hatchery-bred fish. Thereafter, summary judgments were filed, the plaintiffs seeking by summary judgment the inclusion within the base upon which the treaty entitlement is predicated all fish irrespective of source. A motion for summary judgment was filed by defendants seeking the exclusion of first generation hatchery fish from the fishery upon which the allocation is based.

Argument was presented to the court on April 10, 1980 and on September 26, 1980, the district court rendered its decision on both the environmental issue and the hatchery fish issue. 506 F.Supp. 387 (W.D. Wash. 1980). The district court concluded that all hatchery fish should be included because (1) the inclusion of hatchery fish was required by virtue of the reasoning adopted by this court in *Washington Passenger Fishing Vessel Association, supra;* (2) the court concluded that since hatchery programs were largely undertaken to mitigate the effects of the de-

cline of natural fish runs that therefore all hatchery fish must be included; and (3) that state had not established an ownership interest in its hatchery fish.[1]

The circuit court has affirmed the district court's judgment requiring the inclusion of hatchery fish irrespective of source or funding to be included in the fishery base upon which the treaty allocation applies.

REASONS FOR GRANTING THE WRIT

This Court has expressly recognized the existence of a hatchery fish issue in Indian fishing rights cases. See *Washington State Game Department v. Puyallup Tribe, (Puyallup II)*, 414 U.S. 44 (1973), *Washington State Game Dept. v. Puyallup Tribe*, 443 U.S. 165 (1977) *(Puyallup III)* and *Washington v. Washington Passenger Fishing Vessel Association*, 443 U.S. 658 (1979). It has also identified certain factors such as location and funding that must be carefully evaluated in cases involving disputes between states and Indians over control of artificially propagated natural resources. See *New Mexico v. Mescalero Apache Tribe*, ___ U.S. ___ (1983). The district court, however, glossed over these factors and summarily concluded that the treaty right automatically included all hatchery fish. This interpretation conflicts with both the previous declaration of the tribal treaty fishing right and this court's guidelines stated in *New Mexico, supra.*

In *Puyallup II*, which dealt with one of the Indian treaties in the present case, this Court emphasized the importance of the hatchery funding issue. The majority opinion noted:

> "At oral argument counsel for the Department of Game represented the catch of steelhead that were developed from the hatchery program was in one year 60% of the total run and in another 80%. And he stated that approximately 80% of the cost of that

[1]The state did not and has not argued that it maintained an ownership interest in the fish. The concept of state ownership of wildlife was expressly rejected by this court in *Hughes v. Oklahoma*, 441 U.S. 322 (1979).

> program was financed by the license fees of sports fishermen. Whether that issue will emerge in this ongoing litigation as a basis for allocating the catch between the two groups, we do not know. We mention it only to reserve decision on it." *Supra* at 48.

In a separate opinion by Justice White with the Chief Justice Stewart concurring states in part:

> "* * * On the other hand, the Treaty does not obligate the State of Washington to subsidize the Indian fishery with planted fish paid for by sports fishermen. * * *" *Supra* at 49.

In *Puyallup III, supra,* this court affirmed an allocation order which excluded hatchery fish.

Subsequently, this court, in *Washington v. Washington Passenger Fishing Vessel Association,* 443 U.S. 658, 688, referred to the existence of the hatchery issue in footnote 30, but declined to rule on it. (See page 4)

In *New Mexico v. Mescalero Apache Tribe,* ___ U.S. ___ (1983) this Court discussed factors to be considered in resolving wildlife resource jurisdictional issues. In that proceeding this court considered two consolidated cases, one involving the Apache Reservation in New Mexico and the other involving the Colville Reservation in Washington. In both cases the question presented was whether the state could exercise control over hunting and fishing activities by non-Indians within the respective Indian reservations. This Court emphasized that in both situations the reservation fishery had been developed by federal funds and hatchery facilities and the enhanced hunting and fishing opportunity formed the foundation for related tribal enterprises, *i.e.,* a resort on the Apache Reservation. This Court emphasized that in neither situation did the state engage in stocking the fish. *Supra* at 76 L.Ed.2d 611, 626. This Court's critical concern was with who was responsible for the creation of the fishery and that was pivotal in deciding whether the state had jurisdiction over hunting and fishing activities by nontribal members.

In the present case the fundamental question is whether the treaties intended that *all* hatchery-produced fish were to automatically be included in an allocation of

the fishery on the same basis as natural runs.

The facts submitted to the court below show that fish runs in many rivers in the case area have been substantially increased over the runs that would have been present but for the hatchery production. The district court opinion recognized the magnitude of the State's artificial propagation program. In 1979, the State operated nineteen steelhead and sixteen salmon hatcheries in the case area; another sixteen facilities provide limited salmon production assistance. This state program represented a substantial portion of the artificial propagation program in the case area.[2] It was estimated that hatchery fish accounted for 60 percent of the steelhead and 17 percent of salmon in the case area. The record also shows that the state has created fish runs that did not exist historically due to natural blockages and other reasons. Furthermore, many of the state-created or enhanced runs are the result of dedicated funds derived from license fees of non-Indian fishermen.

The courts below disregarded these factors, concluding that all hatchery fish should be included. In effect they held it is immaterial as to who finances hatchery fish programs, their effectiveness, whether new fish runs are created, existing runs augmented or any other factual variations. This conclusion is not supported by either the treaties in question or the court's approach in *New Mexico, supra.*

The treaties did not specifically extend to such hatchery-bred fish because the parties to the treaty, the Indians and the federal government, did not contemplate the existence of such fish or that the same would be introduced into the case area. The Stevens Treaties, the 1854-1855 treaties, could not have reserved that which was not in existence nor even contemplated to become in existence at treaty times. See, *U.S. v. Winans,* 198 U.S. 371, 381 (1905). The state certainly has a property interest in its hatchery fish before they are released into public waters. That property

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[2]The order further recites that 371,000,000 salmon and 8,755,000 steelhead were released into state waters from all hatcheries in 1978-79.

ownership interest, even if terminated by the act of release, nevertheless supports at least a strong jurisdictional interest by the state in a resource which the treaties were not intended to infringe. Since the state has plenary power to exclude others from resources ferae naturae, it stands in a different position than private persons for release of hatchery-produced fish to the wild. *Commonwealth v. Perley,* 130 Mass. 469 (1881). It is appropriate to consider the analogy to the developed waters doctrine, since water, like fish, is a public resource owned by no one until its capture. It is well established in water law that when one, by its own effort, develops waters not otherwise available for use, the developer is entitled to the use of those waters even in times of shortage whether other persons had prior rights in the water system. J. Sacks, Water Law Planning Policy, 492 (1966): See, *e.g., Pomona Land and Water Co. v. San Antonio Water Co.,* 152 Cal. 618, 93 Pac. 881 (1908). This concept applies not only to claims between private appropriators but also between the United States and a state engaged in jurisdictional conflicts over water, *e.g., Israel v. Morton,* 549 F.2d 128 (9th Cir. 1977) (distinction between natural flow and project water); *Nebraska v. Wyoming,* 325 U.S. 589, 639 (1945) (equitable apportionment of only natural flow); *Ide v. United States,* 263 U.S. 497 (1924) (U.S. retained jurisdiction over seepage from its water projects even though it was comingled with other "state waters"). In the present situation it is recognized factually that the hatchery fish could be segregated and that the sources of funding are identifiable. The hatchery program has also resulted in the creation of runs that did not historically exist. Notwithstanding any and all of those considerations, the district court and the circuit court have concluded as a matter of law that all such fish are to be included in the whole which is divided pursuant to the treaty entitlement.

CONCLUSION

The lower court's automatic inclusion of all hatchery fish in the base for the treaty allocation twists the ration-

ale of this court's decision in *Washington Passenger Fishing Vessel Association, supra.* It does damage to the long-standing concepts of treaty interpretation and to a number of other legal principles. It ignores the distinct variations in the nature of the hatchery fish contributions of the various parties to the fishing resource in the case area. Some hatchery fish may be required to be included in the treaty allocation but the extent to which they are so included is dependent upon findings of material facts and a weighing of relevant equities. The lower courts in this instance weighed no equities, considered no facts but simply concluded that as a matter of law hatchery fish are to be included in the base for the treaty allocation. That decision should be reversed by this court.

Respectfully submitted,

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Appendix A — Decision of the United States Court of Appeals for the Ninth Circuit A-1

Appendix B — Decision of the United States District Court, Western District of Washington . B-1

SUMMARY

Appeal from the district court's grant of a declaratory judgment in a dispute over Indian Treaty fishing rights. The judgment pertaining to the allocation of hatchery fish under the Treaty was affirmed but the judgment pertaining to an environmental issue was vacated.

The State of Washington appeals from the district court's grant of a declaratory judgment in the second phase of protracted litigation over Indian Treaty fishing rights in the Pacific Northwest. The district court granted a declaratory judgment with respect to two issues. To resolve the environmental issue, the court declared that the right to take fish necessarily includes the right to have those fish protected from man-made despoliation, so that the treaties impose upon the State a corresponding duty to refrain from degrading or authorizing the degradation of the fish habitat to an extent that would deprive the treaty Indians of their moderate living means. To resolve the hatchery fish issue, the district court declared that hatchery fish are included in the fish to be apportioned by the treaty.

[1] The district court's judgment completely resolved the Tribes' claims in Phase II of the litigation, thus the Court has jurisdiction under 28 U.S.C. § 1291 to review the grant of a declaratory judgment under 28 U.S.C. § 2201. [2] The Court of Appeals must exercise its own sound discretion to determine the propriety of the district court's grant or denial of declaratory relief. [3] The issuance of the declaratory judgment on the environmental issue is contrary to the exercise of sound judicial discretion because the necessary predicates for a declaratory judgment have not been met.

[4] The portion of the judgment resolving the issue of the hatchery fish, however, provides a sufficient basis upon which the court may exercise its discretion. [5] Although *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658 (1979), does not mandate the result reached by the district court, it strongly supports it. [6] The dis-

trict court properly concluded that *Fishing Vessel's* holding that the Tribes are entitled under the treaty to an "adequate supply of fish" supports the inclusion of the hatchery fish in the allocation. [7] Equitable considerations also support the Indians' position. Four factors favor affirmance on this issue: (1) the lack of State ownership of the fish once released; (2) the lack of any unjust enrichment of the Tribes; (3) the fact that hatchery fish and natural fish are not distinguishable for other purposes; and (4) the mitigating function of the hatchery fish programs. [8] Thus, for the Tribes to bear the full burden of the decline caused by their non-Indian neighbors without sharing the replacement achieved through the hatcheries, would be an inequity and inconsistent with the treaty.

Sneed, Circuit Judge, joined by Anderson, Circuit Judge, concurred and noted that he does not retreat from the position taken by the original panel and that this is a situation where it is better to reach an agreement tolerable to a majority.

Ferguson, Circuit Judge, joined by Schroeder, Circuit Judge, concurred and would have also vacated the judgment on the environmental issue because of the absence of a case or controversy in the present posture of the litigation.

Nelson, Circuit Judge, joined by Skopil, Circuit Judge, concurred in part and dissented in part and disagreed with the majority's statement of the proper standard of review for the district court's use of the mechanism of declaratory relief, and would have also affirmed the judgment on the environmental issue.

Norris, Circuit Judge, concurred in part and dissented in part and would have affirmed the judgment on the environmental issue, but expressed no opinion on the merits of the environmental issue.

Poole, Circuit Judge, dissented and opined that the Court is without jurisdiction to hear the appeal.

Affirmed in part, vacated in part.

COUNSEL

Edward B. Mackie, Deputy Attorney General, Temple of Justice, Olympia, Washington, for appellants at en banc rehearing.

Anne S. Almy, Department of Justice, Washington, D.C., for appellees at en banc rehearing.

Alan C. Stay, Evergreen Legal Services, Seattle, Washington, for Quileute and Nisqually Tribes.

OPINION

Before: BROWNING, SNEED, KENNEDY, ANDERSON, SKOPIL, SCHROEDER, ALARCON, POOLE, FERGUSON, NELSON, and NORRIS, Circuit Judges.

PER CURIAM:

The State's petition for rehearing is granted and our opinion of December 17, 1984 is withdrawn. The opinion of the panel which first heard the case is vacated. *See United States v. Washington*, 694 F.2d 1374 (9th Cir. 1983). The following constitutes the opinion of the court.

The State of Washington appeals from the district court's grant of declaratory judgment in the second phase of this protracted litigation over Indian Treaty fishing rights in the Pacific Northwest. The trial court granted the declaratory relief sought by the United States on behalf of the treaty Indians. The Tribes named in the caption joined as intervenors. The district court characterized its disposition as "but the most recent link in a long chain of opinions construing the following twenty-seven words:

> 'The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory. . . .' "

United States v. Washington, 506 F. Supp. 187, 189 (W.D. Wash. 1980).

The district court granted a declaratory judgment with respect to two issues, which it designated as the hatchery fish issue and the environmental issue. To resolve the hatchery fish issue, the court declared that hatchery fish are included in the fish to be apportioned by the treaty. To resolve the environmental issue, the court declared that the right to take fish necessarily includes the right to have those fish protected from man-made despoliation, so that the treaties impose upon the State a corresponding duty to refrain from degrading or authorizing the degradation of the fish habitat to an extent that would deprive the treaty Indians of their moderate living needs. We affirm the district court's declaratory judgment on the hatchery fish issue. We hold that declaratory relief on the environmental issues must be denied and vacate that part of the judgment of the district court.

A century old conflict over fishing rights between the Indians and the State prompted the United States in 1970 to begin litigation on its own behalf and as trustee of interested Indian tribes. The suit was bifurcated for trial into separate parts or phases. *United States v. Washington*, 384 F. Supp. 312, 327-28 (W.D. Wash. 1974) (Boldt, J.), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976); *United States v. Washington*, 459 F. Supp. 1020 (W.D. Wash. 1974-1978), *various appeals dismissed*, 573 F.2d 1117, 1118, 1121 (9th Cir. 1978), decisions at 459 F. Supp. 1020, 1097-118 (W.D. Wash. 1977-1978), *aff'd sub nom. Puget Sound Gillnetters Association v. United States District Court*, 573 F.2d 1123 (9th Cir. 1978), *aff'd in part, vacated in part,* and *remanded sub nom. Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658 (1979) (*"Fishing Vessel"*).

District Judge Boldt's 1974 decision determined that the fishing clause appearing in six treaties negotiated by Governor Issac Stevens between the United States and several Pacific Northwest Indian tribes in 1854 and 1855 entitles the Tribes to a specific allocation of the salmon and steelhead trout in the treaty area

The treaties bind the State of Washington under the Supremacy Clause, U.S. Const. art. VI, cl. 2, which imposes upon the states the obligation to observe and carry out the provisions of treaties of the United States. 506 F. Supp. at 189 n.2, 206; *United States v. Washington*, 384 F. Supp. 312, 401 (W.D. Wash. 1974). The geographical region affected by the treaties comprises the State of Washington west of the Cascade Mountains and north of the Columbia River drainage area, including the American portion of the Puget Sound watershed, the watersheds of the Olympic Peninsula north of the Grays Harbor watershed, and the offshore waters adjacent to those areas.

The Supreme Court affirmed. It held that "[b]oth sides have a right, secured by treaty, to take a fair share of the available fish. . . . [A]n equitable measure of the common right should initially divide the harvestable portion of each run that passes through a 'usual and accustomed place' into approximately equal treaty and nontreaty shares, and should then reduce the treaty share if tribal needs may be satisfied by a lesser amount." *Fishing Vessel*, 443 U.S. at 684-85.

The United States, and the Tribes as intervenors, initiated Phase II in 1976 by filing amended and supplemental complaints. The complaints requested a declaration that artificially propagated hatchery fish are included in the allocable fish population, a declaration that the right to take fish incorporates the right to have treaty fish protected from man-made despoliation, and such further relief as the court deemed necessary to safeguard the rights declared. This phase of the litigation in district court ended with the court's grant of declaratory relief on the hatchery fish and the environmental issues. The State appeals.

We consider first whether the orders of the district court are final and appealable. The district court's grant of declaratory relief followed months of procedural maneuvering by the parties. In July 1978, the Tribes filed with the district court a "Statement of Declaratory and Injunctive Relief." In November 1978, the plaintiffs filed a summary judgment motion seeking a declaratory judgment that the treaty reserves to the Tribes a right to protec-

tion against the State's "adverse environmental actions or inactions." In January 1980, the plaintiffs moved for partial summary judgment on the hatchery fish issue, seeking a declaration that "hatchery fish are included within the 'treaty right of taking fish.' "

The district court granted the motions and directed the parties to file a proposed order consistent with the factual findings and legal conclusions stated in its opinion. 506 F. Supp. at 208. The Tribes filed a proposed declaratory judgment, citing to 28 U.S.C. § 2201, on both the environmental and hatchery fish issues. The proposed order by its terms excluded from its scope any "issue of whether the state has violated the treaty tribes' right to have the . . . environment protected" and "what remedies, if any, plaintiffs are entitled to." The proposed order stated that it "constitutes a final Declaratory Judgment and is reviewable as such."

The district court entered an "Amended Judgment" in January 1981, noting its jurisdiction "pursuant to 28 U.S.C. §§ 1331, 1343(3) and (4), 1345, and 1362, to enter a declaratory judgment pursuant to 28 U.S.C. § 2201." The court's judgment adopted the language of the Tribe's proposed order regarding the scope of the judgment, and reiterated that the "Amended Judgment constitutes a final declaratory judgment and shall be reviewable as such."

[1] The district court's judgment completely resolved the Tribes' claims in Phase II of the action. The plaintiffs were granted the only relief they sought, declaratory judgment on the environmental and hatchery fish issues. We therefore have jurisdiction under 28 U.S.C. § 1291 to review the district court's grant of declaratory judgment pursuant to 28 U.S.C. § 2201. *See United States v. Adair*, 723 F.2d 1394, 1397 (9th Cir.), *cert. denied*, 104 S. Ct. 3536 (1984); *Laguna Hermosa Corp. v. Martin*, 643 F.2d 1376, 1378 (9th Cir. 1981).

The Declaratory Judgment Act does not grant litigants an absolute right to a legal determination. *Zemel v. Rusk*, 381 U.S. 1, 19 (1965); *Public Service Commission v. Wycoff Co.*, 344 U.S.

237, 241 (1952); 28 U.S.C. § 2201 (1982). The decision to grant declaratory relief is a matter of discretion, *A.L. Mechling Barge Lines, Inc. v. United States*, 368 U.S. 324, 331 (1961); *Chesebrough-Ponds, Inc. v. Faberge, Inc.*, 666 F.2d 393, 396 (9th Cir.), *cert. denied*, 459 U.S. 967 (1982), even when the court is presented with a justiciable controversy. *International Harvester Co. v. Deere & Co.*, 623 F.2d 1207, 1217 (7th Cir. 1980); *Muller v. Olin Mathieson Chemical Corp.*, 404 F.2d 501, 505 (2d Cir. 1968). In fact, the court may, after a full consideration of the merits, exercise its discretion to refuse to grant declaratory relief because the state of the record is inadequate to support the extent of relief sought. *National Automatic Laundry & Cleaning Council v. Schultz*, 443 F.2d 689, 703 (D.C. Cir. 1971).

[2] The customary deference for the district court is not applicable to its determination to grant a declaratory judgment. The court of appeals must exercise its own sound discretion to determine the propriety of the district court's grant or denial of declaratory relief. *Bilbrey By Bilbrey v. Brown*, 738 F.2d 1462, 1470 (9th Cir. 1984); *Doe v. Gallinot*, 657 F.2d 1017, 1025 (9th Cir. 1981); *International Harvester Co. v. Deere & Co.*, 623 F.2d 1207, 1217 (7th Cir. 1980); *Delno v. Market Street Ry. Co.*, 124 F.2d 965, 967-68 (9th Cir. 1942); E. Borchard, *Declaratory Judgments* 293-94 (1941).

In determining whether the decision to grant declaratory relief is proper, we consider both the circumstances of the parties and the sound jurisprudence of the court. Declaratory relief should be denied when prudential considerations counsel against its use, *Moore v. U.S. House of Representatives*, 733 F.2d 946, 955 (D.C. Cir. 1984), and the decision to grant declaratory relief should always be made with reference to the public interest. *Public Affairs Associates, Inc. v. Rickover*, 369 U.S. 111, 112 (1962) (per curiam); *Eccles v. Peoples Bank*, 333 U.S. 426, 431 (1948); *National Automatic Laundry & Cleaning Council*, 443 F.2d at 703. Declaratory relief should be denied when it will neither serve a useful purpose in clarifying and settling the legal relations in issue nor terminate the proceedings and afford relief from the uncertainty and controversy faced by the parties.

Winpisinger v. Watson, 628 F.2d 133, 141 (D.C. Cir. 1980) (per curiam); *McGraw-Edison Co. v. Preformed Line Products Co.*, 362 F.2d 339, 342-43 (9th Cir.) (quoting *Yellow Cab Co. v. City of Chicago*, 186 F.2d 946, 950-51 (7th Cir. 1951)), *cert. denied*, 385 U.S. 919 (1966); 10A C. Wright, A. Miller, M. Kane, Federal Practice and Procedure § 2759 (2d ed. 1983) (quoting Borchard, Declaratory Judgments 299 (2d ed. 1941)).

[3] The limitations upon issuance of a declaratory judgment, expressed as a doctrine of judicial discretion, reflect concerns similar to those underlying the case and controversy limitation of Article III, *United Public Workers v. Mitchell*, 330 U.S. 75, 89 (1947); *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 240-41 (1937), though the principles of sound discretion are more comprehensive and are subject to more flexible elaboration by the court. We choose to rest our decision in this case on the proposition that issuance of the declaratory judgment on the environmental issue is contrary to the exercise of sound judicial discretion. The legal standards that will govern the State's precise obligations and duties under the treaty with respect to the myriad State actions that may affect the environment of the treaty area will depend for their definition and articulation upon concrete facts which underlie a dispute in a particular case. Legal rules of general applicability are announced when their consequences are known and understood in the case before the court, not when the subject parties and the court giving judgment are left to guess at their meaning. It serves neither the needs of the parties, nor the jurisprudence of the court, nor the interests of the public for the judiciary to employ the declaratory judgment procedure to announce legal rules imprecise in definition and uncertain in dimension. Precise resolution, not general admonition, is the function of declaratory relief. These necessary predicates for a declaratory judgment have not been met with respect to the environmental issue in this case.

The State of Washington is bound by the treaty. If the State acts for the primary purpose or object of affecting or regulating the fish supply or catch in noncompliance with the treaty as inter-

tion and remedial action by the courts. In other instances, the measure of the State's obligation will depend for its precise legal formulation on all of the facts presented by a particular dispute. The trial court is instructed to vacate its judgment with reference to the environmental aspect of the case.

[4] The declaratory judgment resolving the separate issue relating to hatchery fish does not suffer from similar infirmities. In this context, the state of the record provides a sufficient basis upon which the court may exercise its discretion. Further, a declaratory judgment on the issue clarifies and settles the legal relations of the parties and affords relief from a precise dispute identified in the proceedings.

We consider the merits of the declaratory judgment with respect to the hatchery fish issue. In reaching its decision, the district court correctly assigned special importance to canons for interpretation of Indian treaties. The canons call for promoting the treaties' central purposes; construing treaties as they were originally understood by the tribal representatives, rather than according to legal technicalities; resolving ambiguities in favor of the Indians; and interpreting the treaties in the Indians' favor. 506 F. Supp. at 195 (quoting *Fishing Vessel*, 443 U.S. at 676); *see Jones v. Meehan*, 175 U.S. 1, 11 (1899); *Tulee v. Washington*, 315 U.S. 681, 684-85 (1942); *Seufert Brothers Co. v. United States*, 249 U.S. 194, 198 (1919); *United States v. Winans*, 198 U.S. 371, 380-81 (1905).

Before the district court, the State argued that the first generation of hatchery-produced fish should be excluded from the allocation. It conceded that subsequent generations, which spend their entire life cycle in the natural environment, constitute part of the allocable population. The district court rejected this position, holding that all hatchery fish must be included in the computation of shares "in order to effectuate the parties' intent and the purposes of the fishing clause." 506 F. Supp. at 197.

The district court based its decision upon several factors: (1)

recognized limitation on the Indian right to take fish on the basis of fish species or origin; (3) the role that non-Indian commercial fishing and non-Indian degradation of the fish habitat played in causing the natural fishery's decline; (4) the original purpose of the State hatchery program to replace natural fish that were lost due to man-made causes; and (5) the practical effect of excluding an ever-increasing proportion of the case fish population from the treaty allocation area. 506 F. Supp. at 197-99. Thus, the district court held that hatchery fish constitute fish within the meaning of the treaty regardless of whether they originate in state, Indian, or federal hatcheries, or from cooperative ventures. 506 F. Supp. at 202.

On appeal, the State argues that the district court erred in relying on *Fishing Vessel* to find that hatchery fish are subject to treaty allocation, and that equity protects the State from having to share with the Indians its hatchery contribution. We disagree.

[5] Although *Fishing Vessel* does not mandate the result reached by the district court, it does strongly support it, as do the other grounds relied upon by the district court. The district court determined that *Fishing Vessel*'s reaffirmation of the view that the treaties were designed to guarantee the Tribes an "adequate supply of fish" went "far toward resolving the hatchery issue" in the Tribe's favor. 506 F. Supp. at 197.

In *Fishing Vessel* the Court specifically disclaimed any intention of deciding conclusively the hatchery fish issue. 443 U.S. at 688 n.30. Interpreting the treaty in favor of the Indians, the Court held that because they gave up something of great value, their land, it must be presumed that they obtained significantly valuable rights in return. But because the Indians obtained something of value, it does not necessarily follow that they received everything of value pertaining to "taking fish, at all usual and accustomed grounds. . . ."

[6] However, the district court properly concluded that *Fishing Vessel*'s holding that the Tribes are entitled under the treaty to an "adequate supply of fish" supports the inclusion of hatchery

fish in the allocation. 506 F. Supp. at 197. Contrary to certain statements in the district court's opinion, the Supreme Court in *Fishing Vessel* did not hold that the Tribes were entitled to any particular minimum allocation of fish. Instead, *Fishing Vessel* mandates an allocation of 50 percent of the fish to the Indians, subject to downward revision if moderate living needs can be met with less. The Tribes have a right to at most one-half of the harvestable fish in the case area. This limitation on the amount of fish allocable to the Tribes highlights the need to permit them to share equitably in the hatchery fish.

In short, while we agree with the State that *Fishing Vessel* is not entirely determinative of the hatchery fish issue, we believe that some degree of reliance on that case is well-founded. The Indians are entitled to participate equitably in the increased supply of fish even if made possible solely through the efforts of the State.

[7] Contrary to the State's assertions on appeal, we find that equitable considerations in this case support the Indians' position. Four factors favor affirmance of the district court's declaratory judgment on this issue: (1) the lack of State ownership of the fish once released; (2) the lack of any unjust enrichment of the Tribes; (3) the fact that hatchery fish and natural fish are not distinguished for other purposes; and (4) the mitigating function of the hatchery fish programs.

The Supreme Court has rejected the notion that a state owns fish swimming within its waters. *Douglas v. Seacoast Productions, Inc.*, 431 U.S. 265, 284 (1977). The State does not seriously contest the issue of ownership, but argues by analogy to the developed waters doctrine that it has greater regulatory authority over hatchery fish than over natural fish. In its formulation most helpful to the State, the developed waters doctrine would be that one who by his own efforts develops waters not otherwise available for use has a superior right to the use of those waters, even in times of drought where other appropriators have prior rights in the water system. J. Sax, *Water Law, Planning and Policy* 492 (1968) (citing cases). Indian treaty rights, however,

are not necessarily determined by analogy to water appropriation cases, which involve conflicts between private parties or between the State and a private party. In those cases, the critical factor of special protection for the Indian is absent. When the State relinquishes control over the fish by releasing them to public waters, they may not be excluded from the treaty allocation.

The State argues it has financed the hatchery construction and the Tribes are unjustly enriched if given a share of hatchery fish. The contention is unconvincing. Funding for State hatcheries is derived not only from the State, but also from the tribes, the federal government, and private sources. 506 F. Supp. at 196-97 nn. 31 & 32. More importantly, to allow the source of funding to determine rights would permit the State to buy out treaty fishing rights, not by paying the Tribes, but rather by paying for the replacement of treaty-protected fish with unprotected fish. 506 F. Supp. at 200-01. That which is prohibited directly may not be accomplished by other means.

From 1895 to 1973, the State and its laws and policies made no distinction between hatchery and natural fish. Yet the State urges that distinction now. Biologically, hatchery fish and natural fish are virtually indistinguishable. Even assuming the technological feasibility to distinguish between these fish, we do not accept the distinction as a means for undermining treaty rights. Hatchery fish are included within a host of federal programs. *See, e.g.*, Anadromous Fish Act, 6 U.S.C. § 757a(c) (1982). The term fish in other legal contexts has been held to include lobsters, *State v. Hardy*, 185 A.2d 258 (N.H. 1962), and mussels. *Gratz v. McKee*, 258 F. 335, 338 (8th Cir. 1919). The unavoidable intermingling of natural fish and hatchery fish is in the Tribe's favor when the equities of this case are considered.

[8] The hatchery programs have served a mitigating function since their inception in 1895. 506 F. Supp. at 198. They are designed essentially to replace natural fish lost to non-Indian degradation of the habitat and commercialization of the fishing industry. *Id.* Under these circumstances, it is only just to consider such replacement fish as subject to treaty allocation. For the

Tribes to bear the full burden of the decline caused by their non-Indian neighbors without sharing the replacement achieved through the hatcheries, would be an inequity and inconsistent with the Treaty.

That portion of the district court's judgment granting a declaratory judgment with regard to the hatchery fish issue is AFFIRMED. The declaratory relief granted with regard to the environmental issue is VACATED.

SNEED, Circuit Judge, with whom ANDERSON, Circuit Judge joins, concurring:

I join in the per curiam opinion. In doing so I do not wish to be understood as retreating from the position taken by the panel which initially heard this case. There comes a time, however, in a collegial body in which it is better to reach an agreement that is tolerable by a majority than it is to adhere to one's preferred position. This is such a time.

FERGUSON, Circuit Judge, with whom SCHROEDER, Circuit Judge joins, concurring:

I concur in the majority opinion. In addition to the reasons set forth in the opinion, I would vacate that portion of the district court's judgment which pertains to the environmental degradation issue because of the absence of a case or controversy in the present posture of the litigation.

While it is true that the complaint and amendments filed in this case present a case or controversy, the motion for a summary judgment on the environmental degradation issue does not and the judgment of the district court based on that motion is only an advisory opinion.

It is axiomatic that federal courts will not announce opinions unless concrete issues in actual cases are in question. *United Public Workers v. Mitchell*, 330 U.S. 75, 89 (1947). The United States Constitution, art. III, § 2, cl. 1, limits the judicial power of the federal courts to resolving cases or controversies. The Supreme Court has held:

> A justiciable controversy is . . . : distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. . . . The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. . . . It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

Aetna Life Insurance Co. v. Haworth, 300 U.S. 227, 240-41 (1937) (citations omitted). The requirement of a "case" or "controversy" in order to sustain federal jurisdiction is no less strict under the Declaratory Judgment Act, 28 U.S.C. § 2201, than in other suits. *Altvater v. Freeman*, 319 U.S. 359, 363 (1943).

Although the plaintiffs originally made a specific request to enjoin at least eight separate State activities—claims that would have presented a justiciable controversy—both the question of whether these State activities had violated the Tribes' alleged environmental rights, and, if so, what remedies were appropriate, were excluded from the scope of the plaintiffs' motion before the district court. *See United States v. Washington*, 506 F. Supp. 187, 194, 203 (W.D. Wash. 1980). *See also* Defendant's Statement Re Issues for Pre-Trial Resolution ("Plaintiffs believe that [the environmental issue] is a pure question of law and no factual material is relevant or required."). The court thus decided the scope of treaty rights as a pure issue of law divorced from any factual context. *United States v. Washington*, 506 F. Supp. at 202 ("[T]he only aspect of [the environmental] issue presently

before the Court is the legal question whether the tribes' fishing right includes the right to have treaty fish protected from environmental degradation.").

In reaching its decision, the district court, therefore, considered only the pertinent wording of the treaty, *Washington*, 506 F. Supp. at 189, and a stipulation entered into between the parties, which it termed the "Joint Biology Statement." *Id.* at 203 & n.58. In this Joint Biology Statement, the parties agreed that many factors contributed to the decline of salmon in the State of Washington. These factors resulted primarily from the urbanization and intensive settlement of the area. 506 F. Supp. at 203. The State has conceded only that human activities have contributed to environmental degradation, not that the State's activities have caused the degradation. Indeed, the State asserts it is not at fault for whatever environmental degradation has occurred. It is, however, the affirmative link between the harm alleged by the plaintiffs and the conduct of the defendant which forms the basis for a justiciable controversy. *See O'Shea v. Littleton*, 414 U.S. 488, 494 (1974).

Thus, general "degradation" of the environment or a threat of possible "despoliation" of the fishing habitat without any showing of activities *by the State* which caused or would cause such degradation so as to interfere with the Tribes' treaty rights does not make a justiciable case or controversy. As stated by the Supreme Court in *United States v. West Virginia*, 295 U.S. 463, 474 (1935):

> Until the right asserted is threatened with invasion by acts of the State, which serve both to define the controversy and to establish its existence in the judicial sense, there is no question presented which is justiciable by a federal court.

Because the plaintiffs' motion for partial summary judgment considered by the district court did not reach the questions of whether the State was violating the Tribes' alleged environmental right and, if so, what relief would be warranted, the environ-

mental issue presented to the district court was "too vague and ill-defined to admit of judicial determination." *United States v. West Virginia*, 295 U.S. at 474. Judicial power to declare the rights of individuals " 'is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy.' " *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982) (quoting *Chicago & Grand Trunk Railway v. Wellman*, 143 U.S. 339, 345 (1892)). *See also Longshoremen's Union v. Boyd*, 347 U.S. 222, 224 (1954) ("Determination of the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function.").

Furthermore, as pointed out by the majority, the judgment of the district court provides no guidance for the parties involved and consequently serves no useful purpose. *See Public Service Commission v. Wycoff Co.*, 344 U.S. 237, 244 (1952) (An Article III controversy must "not be nebulous or contingent but must have taken on fixed and final shape so that a court can see what legal issues it is deciding, what effect its decision will have on the adversaries, and some useful purpose to be achieved in deciding them."). The district court found that the treaty placed a duty on the State "to refrain from degrading the fish habitat to an extent that would deprive the tribes of their moderate living needs." 506 F. Supp. at 208. Because this case was decided in a posture divorced from any factual context, it is impossible to perceive what is meant by "degrading the fish habitat," or "moderate living needs." What, for instance, constitutes degradation of the fish habitat? Hospital construction? School construction? Issuance of permits for residential developments? Licensing logging operations? What burden of proof must be met? Must the State show lack of intent? Lack of negligence? Lack of scienter? Lack of causation?

Thus, declaratory relief on the environmental issue, divorced from any consideration of specific State activities, affords no relief form the uncertainty giving rise to the proceeding and

merely provides a beautiful but hollow statement of principle. The State is no wiser about what it can or cannot do than it was before the decision was rendered. In effect, rather than clarifying and settling the legal relations in the issue, the judgment essentially puts the State into receivership—it cannot authorize any construction or development without first seeking a determination in the district court as to whether such construction or development constitutes a prohibited act of "environmental degradation."

Because the issues of causation, liability and remedies were excluded from the district court's determination, and were instead reserved at the time for a later trial, no concrete case or controversy was presented to the district court. The district court thus lacked jurisdiction to render a declaratory judgment with respect to the environmental issue. *See Altvater v. Freeman*, 319 U.S. 359, 363 (1943).

NELSON, Circuit Judge, with whom SKOPIL, Circuit Judge joins, concurring in part and dissenting in part:

I concur in the majority's affirmance of the district court's declaration that hatchery fish are "fish" within the meaning of the treaty clause. However, I must respectfully disagree with the majority's statement of the proper standard of review for the district court's use of the mechanism of declaratory relief. I also believe that under any standard of review, the district court's declaratory judgment on the environmental issue should be affirmed.

STANDARD OF REVIEW

The majority adopts what is essentially a *de novo* standard of review over the district court's discretionary decision to grant declaratory relief. It states that while "[t]he decision to grant declaratory relief is a matter of discretion, . . . [t]he court of appeals must exercise *its own sound discretion* to determine the

propriety of the district court's grant or denial of declaratory relief." Majority op. at 8 (emphasis added). This formulation of the standard of review, while it finds some support in the case law, is troubling. To substitute our discretion for that of the trial court fails to give district courts the deference they deserve over the management of litigation.

I believe strongly that the trial court's decision to utilize the mechanism of declaratory relief is essentially a case-management decision that is properly within the trial court's discretion and subject to review only for an abuse of that discretion. I also believe that review over the declaration itself, *i.e.*, the merits of the judgment, must be *de novo* where, as here, it involves a purely legal question. This view finds support in language from the Supreme Court, *see A.L. Mechling Barge Lines, Inc. v. United States*, 368 U.S. 324, 331 (1961) ("Declaratory judgment is a remedy committed to judicial discretion.") and *Kerotest Manufacturing Co. v. C-O-Two Co.*, 342 U.S. 180, 185 (1952) (stating that "an ample degree of discretion, appropriate for disciplined and experienced judges, just be left to the lower courts"), from within our Circuit, *see McGraw-Edison Co. v. Preformed Line Products Co.*, 362 F.2d 339, 342, 344 (9th Cir.) (stating that employing declaratory relief is within the trial court's sound discretion, and quoting *Kerotest*), *cert. denied*, 385 U.S. 919 (1966), and from outside of it, *see Exxon Corp. v. F.T.C.*, 588 F.2d 895, 900 (3d Cir. 1978) (decision to grant or deny declaratory relief reviewed for an abuse of discretion).

Many cases which have appeared to reject the abuse of discretion standard for the trial court's grant or denial of declaratory relief may have done so because the panels were uncomfortable giving deference to the merits of the declaration; that is, they may have believed that both (1) the propriety of employing the mechanism of declaratory relief, and (2) the declaration itself, had to be reviewed under a single standard. Such deference to the latter, of course, seems inappropriate when we are just as well equipped as the trial court to analyze, for example, a treaty clause. In part, such concerns may explain the "broadening" in this Circuit of the abuse of discretion standard in the context of

declaratory relief. *See, e.g., Bilbrey by Bilbrey v. Brown*, 738 F.2d 1462, 1470 (9th Cir. 1984) (giving "more searching review" to exercise of trial court's discretion); *Doe v. Gallinot*, 657 F.2d 1017, 1025 (9th Cir. 1981) (same). I regret that this en banc panel has not taken the opportunity to reexamine this issue, especially since the vast difference between an abuse of discretion standard and a *de novo* standard may well prove determinative of the outcome of many appeals.

THE ENVIRONMENTAL ISSUE

Once the proper standard of review is applied, both the district court's use of declaratory relief and the merits of its declaration on the environmental issue are entitled to affirmance. Indeed, I would affirm even if a *de novo* standard were applied to the court's use of declaratory relief.

I. Use of the Mechanism of Declaratory Relief

A. *Introduction*

Under the Declaratory Judgment Act,

> any court of the United States may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2201. Before granting declaratory relief, the court must ask first whether an "actual controversy" exists. This requirement, embodied in the Declaratory Judgment Act, is identical to the "case or controversy" requirement of Article III of the U.S. Constitution. *Societe de Conditionnement en Aluminium v. Hunter Engineering Co.*, 655 F.2d 938, 942 (9th Cir. 1981). Next, the court should ask (1) whether the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) whether it will terminate and afford relief from

the uncertainty, insecurity, and controversy giving rise to the proceeding. *McGraw-Edison*, 362 F.2d at 342 (quoting Borchard, *Declaratory Judgments* 299 (2d Ed. 1941)); *accord, President v. Vance*, 627 F.2d 353, 364 n.76 (D.C. Cir. 1980). "It follows that when neither of these results can be accomplished, the court should decline to render the declaration prayed." *McGraw-Edison* at *id.* Here, all necessary conditions are present, making the district court's use of declaratory relief entirely proper. That the declaration may not resolve every aspect of the continuing dispute between the parties does not alter this conclusion.

B. *Actual controversy requirement*

The Supreme Court has outlined the test for determining whether a suit seeking a declaratory judgment is an actual controversy:

> The difference between an abstract question and a "controversy" contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941). Here, the issues resolved by the district court's declaratory judgment have been in dispute throughout the litigation. There is a dispute both immediate and real between the treaty fishermen and the State over the scope of their environmental rights and duties under the treaty. The Tribes have alleged all along that actions by the State have adversely affected the fish habitat. The parties asked the district court to define their rights and duties, and to allocate burdens of proof should further litigation ensue. These are more than abstract questions fash-

ioned by the curious to provide work for this court; they spring from sharply conflicting contentions. In short, this case presents an "actual controversy."

C. *Clarification of legal relations and relief from uncertainty*

A declaratory judgment resolving the environmental issue would also accomplish the goals of clarifying and settling the legal relations in issue and of affording relief from the uncertainty giving rise to the proceeding. Declaratory relief on the environmental issue would resolve a complex and long-lasting dispute over critical aspects of the parties' rights and responsibilities under the treaty. It would enable the parties to know whether, and the extent to which, the fishery must be protected from environmental degradation. The State needs to know whether this right exists in order to make intelligent decisions about future development in the treaty area. The same is true with respect to the United States, which because of its role as plaintiff trustee in this case, has not been able to represent that interest. If the right does exist to some extent, the State and the United States must take it into account in their development decisions. Likewise, the treaty fishermen need to know where they stand after the Supreme Court's decision in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979) ("*Fishing Vessel*"). They are entitled to an answer concerning the treaty their forebears accepted.

D. *Inability of declaratory relief to foreclose all future disputes*

A declaratory judgment on the environmental issue very likely would not resolve all of the questions concerning the scope of the parties' treaty rights and duties. That could be approached only if the judgment held that the treaty fishermen had no right to have the fishery protected and that the State had no duty to refrain from degradation. A judgment more responsive to the treaty fishermen's needs, by contrast, makes future litigation more than a remote possibility. For example, they may argue in

a future case that the State has acted to degrade the fishery in violation of the treaty.

The inability of a declaratory judgment to foreclose all future disputes does not render the remedy inappropriate because "uncertain in dimension," maj. op. at 9. A declaratory judgment need not resolve all the issues in controversy, as long as it resolves a significant disputed issue. *Harris v. United States Fidelity & Guaranty Co.*, 569 F.2d 850, 852 (5th Cir. 1978); E. Borchard, supra, at 298; J. Moore, 6A *Moore's Federal Practice* § 57.08[4], at 57-46 to 57-47 (1983). The Declaratory Judgment Act explicitly recognizes this possibility when it authorizes the use of a declaratory judgment "whether or not further relief is or could be sought." 28 U.S.C. § 2201. Indeed, in most declaratory judgment actions, as in this case, the declaratory judgment would terminate or sharply reduce the possibility of further litigation only if it were decided in favor of one party, but would leave certain issues unresolved were the opposite result reached.

Further, declaratory judgments may appropriately resolve only the existence of certain rights (e.g., the right to have the fishery protected from environmental degradation) claimed by the plaintiffs. *See, e.g., United States v. Adair*, 723 F.2d 1394 (9th Cir.) (dispute over water rights), *cert. denied*, 104 S.Ct. 3536 (1984); *Kimball v. Callahan*, 493 F.2d 564 (9th Cir.) (dispute over Indian's right to hunt, fish and trap on ancestral reservation without state regulation), *cert. denied*, 419 U.S. 1019 (1974); *Crain v. First National Bank*, 324 F.2d 532 (9th Cir. 1963) (dispute over applicability of Klamath Termination Act's private trust provisions); *Maison v. Confederated Tribes*, 314 F.2d 169 (9th Cir.) (dispute over Indians' right to fish without state regulation under treaties involved in instant case), *cert. denied*, 375 U.S. 829 (1963).

E. *Conclusion*

In short, a declaratory judgment resolving the environmental issue would advance the interests of all the parties in this case

the parties, declaratory relief would clarify and settle the legal relations in issue and would afford substantial relief from the uncertainty the parties face. The district court thus acted properly in invoking, at the moving party's request, the mechanism of declaratory relief on the environmental issue.

II. Merits of the Declaration

A. *Introduction*

The district court declared that the Tribes have a right under the treaty "to a sufficient quantity of fish to provide a moderate living subject to a maximum of 50 percent of the harvestable anadromous fish," and a related right "not to have the fishery habitat degraded by the actions of man which cause environmental damage resulting in such a reduction of available harvestable fish that the moderate living standard . . . cannot be met." The court further declared that the state has a correlative duty "to refrain from degrading or authorizing others to degrade the fish habitat to the extent that would deprive the Tribes of their moderate living needs." The court also assigned burdens of proof should further litigation be necessary. I would affirm the court's declarations on these issues.

B. *The Tribes' right and the State's correlative duty*

Fishing Vessel held that the treaty fishing clause gives the Tribes more than just equal access to the fishing grounds or "merely the chance . . . occasionally to dip their nets into the territorial waters." 443 U.S. at 679. Rather, the treaty entitles the Tribes to an allocation of fifty percent of the harvestable fish runs that pass through their accustomed fishing places, subject to reduction if the Tribes' moderate living needs can be satisfied with less.

While I do not believe that the State can be required to alleviate shortages resulting from wholly natural causes, the language and reasoning of *Fishing Vessel* compel a finding that the State

ment, "degrade[] or authoriz[e] others to degrade the fish habitat to [an] extent that would deprive the Tribes of their moderate living needs."

The Court in *Fishing Vessel* expressed a concern that the State, in adjusting downward the fifty percent share, should not allow the Tribes' allocation to fall below the level necessary to meet moderate living needs. The treaty clause, explained the Court,

> secures *so much as, but no more than, is necessary to provide the Indians with a livelihood—that is to say, a moderate living.* Accordingly, while the maximum possible allocation to the Indians is fixed at 50%, the minimum is not; the latter will, upon proper submission to the District Court, be modified in response to changing circumstances. If, for example, a tribe should dwindle to just a few members, or if it should find other sources of support that lead it to abandon its fisheries, a 45% or 50% allocation of an entire run that passes through its customary fishing grounds would be manifestly inappropriate because the livelihood of the tribe under those circumstances could not reasonably require an allotment of a large number of fish.

443 U.S. at 686-87 (emphasis added).[1] Additionally, the Court found its fish allocation scheme consistent with its prior decisions concerning Indian treaty rights to scarce natural resources. There, too, "the Court typically ordered a trial judge or special master, in his discretion, to devise some apportionment that assured that the Indians' *reasonable livelihood needs would be* met." *Id.* at 685 (emphasis added). Certainly this language would not be compatible with any scheme which permitted the State to reduce the Tribes' share below the level necessary to meet their moderate living needs.

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[1]We recently relied on this language from *Fishing Vessel* to find that the Klamath Indians are entitled to that level of water use which will supply them with a "moderate living" standard. *See United States v. Adair*, 723 F.2d 1394 (9th Cir.), *cert. denied*, 104 S.Ct. 3536 (1984).

The Court's reasons for concluding in *Fishing Vessel* that the Tribes are entitled to an actual share of the fish are also instructive here. As the Court noted when interpreting the treaty clause,

> Governor Stevens and his associates were well aware of the "sense" in which the Indians were likely to view assurances regarding their fishing rights. During the negotiations, the vital importance of the fish to the Indians was repeatedly emphasized by both sides, and the Governor's promises that the treaties would protect that source of food and commerce were crucial in obtaining the Indians' assent. See supra, at 666-668. It is absolutely clear, as Governor Stevens himself said, that neither he nor the Indians intended that the latter "should be excluded from their ancient fisheries," see n.9, supra, and it is accordingly inconceivable that either party deliberately agreed to authorize future settlers to crowd the Indians out of any meaningful use of their accustomed places to fish. That each individual Indian would share an "equal opportunity" with thousands of newly arrived individual settlers is totally foreign to the spirit of the negotiations. Such a "right," along with the $207,500 paid the Indians, would hardly have been sufficient to compensate them for millions of acres they ceded to the Territory.

Id. at 676-77. If it is "inconceivable" that the Indians would have agreed to be required to fish on the same terms as non-Indians, it is equally unthinkable that they would have agreed to allow the State, or persons authorized by the State, to degrade the fish habitat in a way that would deprive them of their moderate living needs.[2] In this respect, the district court correctly noted that the

[2]The State urges us to approve any government plan to degrade the habitat as long as it is applied to treaty and non-treaty fishermen alike. However, the Supreme Court has already rejected the contention that the treaties confer upon the Indians only those rights enjoyed by non-Indians. As the Court stated in *Fishing Vessel*, "[w]hatever opportunities the treaty assures Indians with respect to fish are admittedly not 'equal' to, but are to some extent greater than, those afforded other citizens. . . ." 443 U.S. at 676-77 n.22. The notion that non-discriminatory equal treatment of Indians and non-Indians fulfills the State's obligation ignores the very bargain the Indians struck by signing the Treaties. They did not bargain for equal treatment; they bargained for the right to take fish.

Supreme Court's resolution of the Phase I allocation question "all but resolved" the environmental issue in the Tribes' favor. *United States v. Washington*, 506 F. Supp. 187, 203 (W.D. Wash. 1980).

The district court's declaration that the State is under a correlative duty "to refrain from degrading or authorizing others to degrade the fish habitat to the extent that would deprive the Tribes of their moderate living needs" by no means represents an extraordinary limitation of State authority. Relations between the Indians and the federal government have always been the exclusive domain of the federal government—the states are excluded, unless Congress elects to include them. Those cases which allow the State a limited amount of regulatory control over Indian fishing are unusual exceptions to the general rule of non-interference. It was only the peculiarities of a shared fishery which necessitated the ruling in *Puyallup Tribe v. Department of Game*, 391 U.S. 392 (1968) ("*Puyallup I*"), that the State could exercise a slight degree of regulatory power. That control, moreover, was permitted only to preserve the fish from extinction. *Antione v. Washington*, 420 U.S. 194, 207 (1975); *Department of Game v. Puyallup Tribe*, 414 U.S. 44 (1973) ("*Puyallup II*"). Thus, the result of those cases was to sanction for the first time a limited intrusion by the State into the exercise of federal treaty rights for purposes of fish conservation and proper division of the run. We should not extend this intrusion any further than is absolutely necessary.

In summary, I agree with the district court that the Tribes have an implicit treaty right to a sufficient quantity of fish to provide them with a moderate living, and the related right not to have the fishery habitat degraded to the extent that the minimum standard cannot be met. I also agree that the State has a correlative duty to refrain from degrading or authorizing others to degrade the fish habitat in such a manner.[3]

[3]The portion of the district court's declaratory judgment on these related environmental issues reads as follows:

> 2. The fishing clauses of the Stevens Treaties implicitly reserve to the Tribes the right to a sufficient quantity of fish to provide a moder-

C. *Burden of proof*

The district court's declaratory judgment set forth the parties' respective burdens of proof in the event further litigation is necessary on the environmental issue. I agree with the court's allocation.[4]

The plaintiffs should have the initial burden of proving that allegedly adverse environmental actions by the State proximately cause the fish habitat to be degraded such that the rearing or production potential of the fish will be impaired or the quality or quantity of the run will be diminished. Once this burden is met, the State should bear the burden of proving that the Tribes' moderate living needs are met despite such impairment.

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ate living subject to a maximum of 50 percent of the harvestable anadromous fish.

3. The Tribes have an implicitly incorporated right under the fishing clauses of the Stevens treaties not to have the fishery habitat degraded by the actions of man which cause environmental damage resulting in such a reduction of available harvestable fish that the moderate living standard, as implemented through the allocation orders of the District Court in Phase I, cannot be met.

4. The State has a correlative duty under the Supremacy Clause of the Constitution of the United States, independent of the duty of the United States and of third parties, to refrain from degrading or authorizing others to degrade the fish habitat to the extent that would deprive the Tribes of their moderate living needs, as implemented through the allocation orders of the District Court in Phase I.

[4]The portion of the district court's judgment allocating burdens of proof reads as follows:

5. The plaintiffs bear the burden of proving that those actions which are challenged proximately cause the fish habitat to be degraded such that the rearing or production potential of the fish will be impaired or the size or quality of the run will be diminished.

6. The State has the burden of showing that the environmental damage to the fishery resource proved by the plaintiffs will not impair the Tribes' moderate living needs, as implemented through the allocation orders of the District Court in Phase I. If the treaty allocation of harvestable fish is at 50 percent, then there is a presumption that the moderate living needs are not being met.

We should leave it to district courts to define in the first instance, as facts are brought forward in any future litigation, the kinds of actions which may be attributed to the State, the precise casual connections required, the parameters of the phrase "moderate living needs," and the propriety of various forms of injunctive or monetary relief. Such issues were not raised in this declaratory judgment action, and to attempt to deal with them at this stage would serve to confuse, rather than to clarify, the treaty relationship here. That such issues were not raised here, however, does not render the court's declaration on the merits anything less than "precise resolution," maj. op. at 9, of the scope of the treaty rights and duties. The district court's allocation of burden of proof, coupled with its environmental declaration, would go far in allowing for "immediate correction and remedial action by the courts," maj. op. at 9-10, in the event the State violates its treaty duties. Sadly, the majority apparently does not agree.

CONCLUSION

The majority properly affirms the district court's judgment that hatchery fish are "fish" under the treaty clause. I would hold, however, that the trial court properly employed the mechanism of declaratory relief on the environmental issue, and would affirm its declaration on that issue.

NORRIS, Circuit Judge, concurring in part and dissenting in part:

I concur in the judgment of the court on the hatchery fish issue. I dissent from the decision to vacate the declaratory judgment on the environmental issue for the reasons articulated in Judge Nelson's dissenting opinion. Because the court does not reach the merits of the environmental issue, I express no opinion on that issue at this time.

POOLE, Circuit Judge, dissenting.

Today, by per curiam opinion, this court has ventured in review of an appeal of two orders of the district court. Neither order is final under 28 U.S.C. § 1291, nor brought by certification as a controlling issue of law under 28 U.S.C. § 1292(b), nor accompanied by the trial judge's double certification called for by Rule 54(b) of the Federal Rules of Civil Procedure. Because I believe we are thus without jurisdiction to entertain such an appeal, I respectfully dissent.

A brief examination of two paragraphs of the majority opinion immediately discloses the basis of the majority's procedural confusion:

> In July 1978, the Tribes filed with the district court a "Statement of Declaratory and Injunctive Relief." In November 1978, the [Tribes] filed a summary judgment motion seeking a declaratory judgment that the treaty reserves to the Tribes a right to protection against the State's "adverse environmental actions or inactions." In January 1980, the [Tribes] moved for *partial* summary judgment on the hatchery fish issue, seeking a declaration that "hatchery fish are included within the 'treaty right of taking fish.' "
>
> The district court granted the motions and directed the parties to file a proposed order consistent with the factual findings and legal conclusion stated in its opinion. 506 F.Supp. at 208. The Tribes filed a proposed declaratory judgment, citing to 28 U.S.C. § 2201, on both the environmental and hatchery fish issues. The proposed order by its terms excluded from its scope any "issue of whether the state has violated the treaty tribes' right to have the * * * environment protected" and "what remedies, if any, plaintiffs are entitled to." The proposed order stated that it "constitutes a final Declaratory Judgment and is reviewable as such."

Maj. Op. at 6-7. Thus, the majority identifies the presence before the trial court for adjudication of a number of issues, of which it identifies four: the environmental and hatchery fish issues, whether the state was in violation of the treaty as to either, and whether injunctive or other relief was appropriate. Only two of the several issues as to which relief was being sought have been presented on this appeal. The case is not final or ripe for our review, and the majority has simply given an advisory opinion.

The district judge knew that his work was not done when he issued the two declaratory orders which the court has acted upon. He explicitly postponed for future consideration any implementation of his declaration, obviously preferring rather to have this court put its seal of approval upon his abstract scanning of the treaty's meaning. Put on hold was the formidable task of stating in concrete and meaningful terms to the state and to the Tribes the reality of that document's application to fishing rights in times of scarcity. Reserving for future hearings the making of the hard decisions was of course an option open to the trial court. All it had to do was to follow the procedures provided by law for disposing of "fewer than all of the claims" at issue. We do not know what the trial court really had in mind in adopting the ambiguous language, cited by the plaintiffs-authors, stating that the proposed order "constitutes a final Declaratory Judgment and is reviewable as such." We do know that there are still many issues left in the case.

Rule 54(b) of the Federal Rules of Civil Procedure provides:

> When more than one claim for relief is presented in an action, * * * the court may direct the entry of a final judgment as to one or more but fewer than all of the claims * * * *only* upon an *express* determination that there is no just reason for delay and upon an express direction for the entry of judgment. *In the absence of such determination and direction, any order or other form of decision, however designated*, which adjudicates fewer than all the claims or the rights and liabili-

> action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(Emphasis supplied.) The language of the rule is mandatory and applies to "any order or other form of decision, *however designated*, which adjudicates fewer than all the claims * * *." The rule does not purport to make an exception simply because the judgment is designated as a final declaratory judgment. The absence of a certification under Rule 54(b) renders non-final and hence non-appealable both orders in this case because these orders did not adjudicate all the claims nor the rights and liabilities of all the parties.

It would be anomalous were Rule 54(b) subject to avoidance merely by labeling any non-final order a "declaration," and hence allow for review in advance of the end of the case. This would nullify the rule and would enlarge the declaratory judgment exception so as to permit endless advisory judgments by the courts of appeals. Therefore, since neither order qualifies for review as a final or certified order, the majority is wrong in granting review for there is no jurisdiction to do so. We may have time in future days to regret opening the door to such appeals.

Nor is either order in the present posture reviewable under the discretionary appeal provision of 28 U.S.C. § 1292(b), for that section merely permits a trial court to certify for review a ruling deemed to constitute a "controlling question of law" where an immediate appeal may help speed the end of litigation. An appeal under § 1292(b) also requires a certification by the trial court, and the appeal is discretionary by this court. The trial judge could have made a § 1292(b) certification, but did not, and the majority does not contend that that statutory authorization is implicated.

Basing its rationale on a novel application of "judicial discretion" which it seems somehow to believe supplies appellate jurisdiction to review any order felicitously styled as a declara-

tory judgment, the majority assumes an unexplained authority to decide the merits of both the environmental and hatchery fish issues without once *mentioning* Rule 54(b) or § 1292(b). The majority has contrived a remarkably simplistic disposition of the environmental issue, perceiving no difficulty in coming to grips with its merits, and simply dismissing that ruling of the trial court with the statement that "issuance of the declaratory judgment on [that] issue is contrary to the exercise of sound judicial discretion," Maj. Op. at 9, because that judgment is "imprecise in definition and uncertain in dimension." *Id.* at 9. I cannot fathom the reasoning supporting this determination. The environmental claim is said to be before us, not as a discretionary appeal, but as a judgment of finality here for review. We might well conclude that the judgment is not supported by the record, justifying reversal, or that it suffered some technical shortcoming which barred review, justifying remand or dismissal. But I know of no principle which otherwise empowers us to omit decision on a judgment which is final enough for us to review its content, but so mystically infirm that, in our "discretion," we simply vacate it—for lack of *enough* finality!

In its wisdom, the majority has declined either to endorse or disapprove the district court's declaration as to the most important issue before it: whether degradation by act or permission of the state contravenes the treaty. Saying that "precise resolution, not general admonition, is the function of declaratory relief," *id.*, misses the entire point and purpose of appellate review of interim trial court rulings. If partial judgment is in order, and there is "no just reason for delay," concreteness and "precise resolution" will be obvious under Rule 54(b). If, though not ripe for finality, the ruling is not a "controlling question of law" 28 U.S.C. § 1292(b) does not require much more than ascertaining that there was a ruling on a controlling legal question. And, 28 U.S.C. § 2201 requires little more when that statute is properly at issue.

In this case, Judge Orrick's environmental ruling, while not purporting to end the case, was clear enough to be understood by all sides as a ruling. It stated:

> The treaties reserve to the tribes a sufficient quantity of fish to satisfy their moderate living needs, subject to a ceiling of 50 percent of the harvestable run. [Citation omitted.] That is the minimal need which gives rise to an implied right to environmental protection of the fish habitat. Therefore, the correlative duty imposed upon the State (as well as the United States and third parties) is to refrain from degrading the fish habitat to an extent that would deprive the tribes of their moderate living needs.

506 F.Supp. at 108.

The proper course for the majority, if it thought it had a final 28 U.S.C. § 2201 declaratory judgment on this appeal, would have been to rule on its merits. Instead, the majority accepts final order jurisdiction and then vacates the order as not having said enough. Thus the § 2201 order is treated as if it were a § 1292(b) discretionary appeal and is ordered vacated. *Mirabile dictu*! This straddles everything and leaves nothing clear.

I believe we err in deciding either issue. Certainly, if the majority is correct in deeming the environmental judgment not appropriate for appellate review, that must be because the trial court merely made a mid-trial ruling which would guide the trial but could be changed, and at any rate would need implementation in the future. Trial judges do that all the time. That is what 28 U.S.C. § 1292(b) purports to make reviewable on proper certification. This is what Rule 54(b) recognizes as decisions "subject to revision at any time" before final judgment. Perhaps, anticipating how much more ground was yet to be covered before the environmental problems would be concluded, the majority was reluctant to make the district court's interlocutory ruling become law of the case. At any event, upon this court's mandate, the hatchery fish issue will become such case law—despite the fact that the hatchery decision has meaning only in relation to the vacated environmental ruling.

Of course this case has gone through many stages and the majority's desire to reach some conclusion is understandable. But

it should be the right conclusion and should not set a dangerous review precedent for the future. The proper treatment of these unfinished declarations would be to return both to the trial court, without prejudice to the trial court's right to invoke Rule 54(b) or § 1292(b), if appropriate, so that both issues may be finally determined together. Neither is now in shape for us to decide. I would dismiss the appeal for want of jurisdiction because of the absence of any final order under 28 U.S.C. § 1291, or certification under Fed. R. Civ. P. 54(b), or certification under 28 U.S.C. § 1292(b), and would direct the district court to do it right.

UNITED STATES of America et al., Plaintiffs,

v.

STATE OF WASHINGTON et al., Defendants.
Civ. No. 9213—Phase II.

United States District Court, W. D. Washington.

Sept. 26, 1980.

United States, on its own behalf and as trustee of several Indian tribes, brought suit against the State of Washington and others, seeking declaratory and injunctive relief concerning off-reservation treaty right fishing. On parties' cross motions for summary judgment, the District Court, Orrick, J., held that: (1) hatchery-bred and artificially-prolonged fish were "fish" within meaning of fishing clause of treaties between the United States and several Pacific Northwest Indian tribes, and therefore, were required to be included in computation of tribe's treaty share; (2) implicitly incorporated in fishing clause was right to have fishery habitat protected from man-made despoliation; (3) fact that federal government was under a duty, as party to treaties, not to violate tribes' environmental right did not relieve State of its comparable obligations, under supremacy clause, to observe and carry out provisions of treaties; and (4) duty imposed upon State, as well as United States on third parties, was to refrain from degrading fish habitat to extent that would deprive tribes of their moderate living needs.

Ordered accordingly.

1. Indians 3

Indian treaties must be interpreted so as to promote their central purposes.

2. Indians 3

Indian treaties must be read in light of common notions of the day and assumptions of those who drafted them.

3. Indians 3

Any ambiguities in Indian treaties must be resolved in Indians' favor; wording of treaties with Indians is not to be construed to their prejudice.

4. Indians 3

Hatchery-bred and artificially-propogated fish were "fish" within meaning of fishing clause of treaties between United States and several Pacific Northwest Indian tribes, and therefore, were required to be included in computation of tribe's treaty share of fish. Treaty with Nisquallys, 10 Stat. 1133; Treaty with Dwámish, 12 Stat. 927; Treaty with the S'Klallams, 12 Stat. 933; Treaty with the Makah Tribe, 12 Stat. 939; Treaty with the Yakamas, 12 Stat. 951; Treaty with the Qui-nai-elts, 12 Stat. 971.[a]

5. Indians 3

Implicitly incorporated in fishing clause of treaties between United States and several Pacific Northwest Indian tribes was right to have fishery habitat protected from man-made despoliation. Treaty with Nisquallys, 10 Stat. 1133; Treaty with the Dwámish, 12 Stat. 927; Treaty with the S'Klallams, 12 Stat. 933; Treaty with the Makah Tribe, 12 Stat. 939; Treaty with the Yakamas, 12 Stat. 951; Treaty with the Qui-nai-elts, 12 Stat. 971.

6. Indians 3

Under implied-reservation-of-water doctrine that is often employed in construction of Indian treaties, water rights may be implied only where water is necessary to fulfill very purposes for which federal reservation was created, and not where it is merely valuable for secondary use of reservation; however, so long as water rights are necessary to exercise expressly-reserved rights, they arise by implication regardless of equities that may favor competing water users.

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[a]See publication Words and Phrases for other judicial constructions and definitions.

7. Indians 3

Under implied-reservation-of-water doctrine that is often employed in construction of Indian treaties, scope of implied right is circumscribed by necessity that calls for its creation; doctrine reserves only that amount of water necessary to fulfill purpose of reservation, no more.

8. Indians 3

Fact that federal government was under a duty, as party to treaties between United States and several Pacific Northwest Indian tribes, not to violate tribes' environmental right did not relieve state of Washington of its comparable obligations, under supremacy clause, to observe and carry out provisions of treaties. Treaty with the Nisquallys, 10 Stat. 1133; Treaty with the Dwámish, 12 Stat. 927; Treaty with the S'Klallams, 12 Stat. 933; Treaty with the Makah Tribe, 12 Stat. 939; Treaty with the Yakamas, 12 Stat. 951; Treaty with the Qui-nai-elts, 12 Stat. 971; U.S.C.A. Const. Art. 6, cl. 2.

9. Indians 3

Treaty-secure right of Indians to take fish at usual and accustomed places may not be qualified or conditioned by the state, nor may the state subordinate fishing right to any other objectives or purposes it may prefer.

10. Indians 3

State may affirmatively regulate treaty-secured right of Indians to take fish solely for purpose of conserving the resource.

11. Indians 3

Under fishing clause of treaties between the United States and several Pacific Northwest Indian Tribes reserving to tribes sufficient quantity of fish to satisfy their moderate living needs, subject to ceiling of 50% of harvestable run, duty imposed upon state of Washington, as well as United States and third parties, was to refrain from the degrading fish habitat to extent that would deprive tribes of their moderate living needs. Treaty with the Nisquallys, 10 Stat. 1133; Treaty with the Dwámish, 12 Stat. 927;

Treaty with the S'Klallams, 12 Stat. 933; Treaty with the Makah Tribe, 12 Stat. 939; Treaty with the Yakamas, 12 Stat. 951; Treaty with the Qui-nai-elts, 12 Stat. 971.

William A. White, Atty., Indian Resources Section, Land & Natural Resources Div., Dept. of Justice, Washington, D.C., George D. Dysart, Atty., Dept. of Justice, Land & Natural Resources Div., Portland, Or., for the U.S.

Alan C. Stay, Phillip E. Katzen, Evergreen Legal Services, Seattle, Wash., for Jamestown Band-Clallam, Lower Elwha, Muckleshoot, Nisqually, Nooksack, Port Gamble Band-Clallam, Samish, Sauk-Suiattle, Skokomish, Snohomish, Snoqualmie, Squaxin Island, Steilacoom, Stillaguamish, Suquamish and Upper Skagit Tribes.

Mason D. Morisset, Steven S. Anderson, Ziontz, Pirtle, Morisset, Ernstoff & Chestnut, Seattle, Wash., for Lummi, Makah, Quileute and Tulalip Tribes.

John Clinebell, Tacoma, Wash., William H. Rodgers, Jr., Seattle, Wash., for Puyallup Tribe.

Peter J. Wilke, Bellevue, Wash., for Swinomish Indian Tribal Community.

Joanne Eileen Foster, Taholah, Wash., for Quinault Tribe.

Alan C. Alhadeff, Alhadeff, Leavitt & Wesley, Seattle, Wash., for Dwámish Tribe.

James B. Hovis, Hovis, Cockrill & Roy, Yakima, Wash., for Yakima Indian Nation.

Daniel A. Raas, Bellingham, Wash., for Lummi Tribe.

Susan Kay Hvalsoe, Cullen, Holm, Hoglund & Foster, Olympia, Wash., for Hoh Indian Tribe.

Slade Gorton, Atty. Gen., Edward B. Mackie, Deputy Atty. Gen., State of Wash., Olympia, Wash., for State of Wash.

James M. Johnson, Sr. Asst. Atty. Gen., Dennis Reynolds, Asst. Atty. Gen., Dept. of Game, State of Wash., Olympia, Wash., for Departments of Fisheries and Game.

Charles E. Yates, Moriarty, Long, Mikkelborg & Broz, Seattle, Wash., for Reefnet Owners Assn.

Joseph T. Mijich, John P. World, Seattle, Wash., for Purse Seine Vessel Owners Ass'n, amicus curiae.

OPINION

ORRICK, District Judge.

This opinion constitutes but the most recent link in a long chain of opinions construing the following 27 words:

> "The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, * * *."[1]

The quoted clause appears in six treaties negotiated between the United States and several Pacific Northwest Indian tribes in 1854 and 1855.[2] The Indians traded their interest in the land west of the Cascade Mountains and north of the Columbia River for the exclusive use of small land parcels (reservations), cash payments, and various guarantees, including, of prime importance in 1854-1855 as well as today, the right to continue fishing. In each of the seven cases where the Supreme Court has directly addressed the scope of the fishing clause in these treaties, it has "placed a relatively broad gloss on the Indians' fishing rights." *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n,* 443 U.S. 658, 679, 99 S.Ct.

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[1]Article III, Treaty of Medicine Creek, 10 Stat. 1133 (1855). The balance of Article III is as follows:

> "* * * and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: *Provided, however,* That they shall not take shell fish from any beds staked or cultivated by citizens."

[2]Articles identical or substantially identitical to Article III of the Treaty of Medicine Creek are contained in the Treaty of Point Elliott, 12 Stat. 927 (1859), the Treaty of Point No Point, 12 Stat. 933 (1859), the Treaty with the Makah (Treaty of Neah Bay), 12 Stat. 939 (1859), the Treaty with the Yakimas, 12 Stat. 951 (1859), and the Treaty with the Quinault (Treaty of Olympia), 12 Stat. 971 (1859).

The following tribes, or their predecessors in interest, were parties to the treaties and have intervened in the litigation: Muckleshoot, Nisqually, Puyallup, Squaxin Island (Treaty of Medicine Creek); Lummi, Nooksack, Sauk-Suiattle, Stillaguamish, Suquamish, Swinomish, Tulalip, Upper Skagit (Treaty of Point Elliott); Lower Elwha Band of Clallam, Port Gamble Bank of Clallam, Skokomish (Treaty of Point No Point); Makah (Treaty of Neah Bay); Yakima (Treaty with the Yakimas); Hoh, Quileute, and Quinaults (Treaty of Olympia). *United States*

3055, 3071, 61 L.Ed.2d 823 (1979).[3]

This complex case, which was commenced in 1970 by the United States on its own behalf and as trustee of seven Indian tribes,[4] involves three key issues: (1) whether the treaties' fishing clause entitles the Indians to a specific allocation of the salmon and steelhead trout[5] in the "case

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v. State of Washington, 384 F.Supp. 312, 349 (W.D. Wash. 1974) *("Final Decision I")*, *aff'd* 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086, 96 S.Ct. 877, 47 L.Ed.2d 97 (1976); *United States v. State of Washington*, 459 F.Supp. 1020, 1039-1042 (W.D. Wash. 1974-1978) *("Post-Trial Decisions")*, *various appeals dismissed*, 573 F.2d 1117 (9th Cir 1978), 573 F.2d 1118 (9th Cir. 1978), 573 F.2d 1121 (9th Cir. 1978), decisions at 459 F.Supp. 1020, 1097-1118 (W.D. Wash. 1977-1978), *aff'd sub nom. Puget Sound Gillnetters Ass'n v. United States District Court for the Western District of Washington*, 573 F2d 1123 (9th Cir. 1978), *aff'd in part, vacated in part, and remanded sub nom. Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n.* 443 U.S. 658, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979) *("Washington—Phase I")*.

Although the Makah Tribe and the Yakima Nation were organized entities prior to the negotiation of the treaties, many of the "tribes" were actually loose aggregations of individuals and the federal officials deemed them to be tribes and appointed "chiefs" for the purpose of negotiating the treaties. *Washington—Phase I*, *supra*, 443 U.S. at 664 n.5, 99 S.Ct. at 3064 n.5.

[3]The other six cases, in chronological order, are *United States v. Winans*, 198 U.S. 371, 25 S.Ct. 662, 49 L.Ed. 1089 (1905); *Seufert Bros. Co. v. United States*, 249 U.S. 194, 39 S.Ct. 203, 63 L.Ed. 555 (1918); *Tulee v. Washington*, 315 U.S. 681, 62 S.Ct. 862, 86 L.Ed. 1115 (1942); *Puyallup Tribe v. Department of Game*, 391 U.S. 392, 88 S.Ct. 1725, 20 L.Ed.2d 689 (1968) *("Puyallup I")*; *Department of Game v. Puyallup Tribe*, 414 U.S. 44, 94 S.Ct. 330, 38 L.Ed.2d 254 (1973) *("Puyallup II")*; *Puyallup Tribe v. Department of Game*, 433 U.S. 165, 97 S.Ct. 2616, 53 L.Ed.2d 667 (1977) *("Puyallup III")*.

[4]Initially, the United States brought suit on behalf of the Hoh, Makah, Muckleshoot, Nisqually, Puyallup, Quileute, and Skokomish tribes. Subsequently, those tribes and the following others intervened as plaintiffs on their own behalf: Duwamish, Jamestown Band of Clallam, Lower Elwha Samish, Sauk-Suiattle, Snohomish, Snoqualmie, Tulalip, Upper Skagit River, Tulalip, and Yakima.

The defendants are the State of Washington ("State"), the Washington Department of Fisheries ("Fisheries"), the Washington Game Department ("Game"), their respective directors, and the Washington Reef Net Owners Association. Numerous agencies and interested organizations have participated actively as *amici curiae*.

[5]The fish covered by the treaties include the chinook, chum, coho, pink, the sockeye species of salmon as well as steelhead trout. Those

area";[6] (2) if such allocation is required, whether hatchery-bred and artificially-propagated fish are included in the allocable fish population; and (3) whether the right of taking fish incorporates the right to have treaty fish protected from environmental degradation.

The case has been litigated in two phases. In Phase I, which focused on the allocation issue, a series of trial and appellate court decisions culminated in a 1979 Supreme Court opinion which conclusively established the tribes' treaty-based right to take the lesser of 50 percent of the "harvestable" case area fish or a sufficient quantity of fish to provide them with a moderate standard of living. *United States v. State of Washington,* 384 F.Supp. 312 (W.D. Wash. 1974) *("Final Decision I"), aff'd* 520 F.2d 676 (9th Cir. 1975), *cert. denied,* 423 U.S. 1086, 96 S.Ct. 877, 47 L.Ed.2d 97 (1976); *United States v. State of Washington,* 459 F.Supp. 1020 (W.D. Wash. 1974-1978) *("Post-Trial Decisions"), various appeals dismissed,* 573 F.2d 1117 (9th Cir. 1978), 573 F.2d 1118 (9th Cir. 1978), 573 F.2d 1121 (9th Cir. 1978), decisions at 459 F.Supp. 1020, 1097-1118 (W.D. Wash. 1977-1978), *aff'd sub nom. Puget Sound Gillnetters Ass'n v. United States District Court for the Western District of Washington,* 573 F.2d 1123 (9th Cir 1978), *aff'd in part, vacated in part, and remanded sub nom. Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n,* 443 U.S. 658, 685-687, 99 S.Ct. 3055, 3074-3075, 61 L.Ed.2d 823 (1979) *("Washington—Phase I").* While retaining jurisdiction to ensure the implementation of the Phase I-decreed allocation, the

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who fish for salmon do so primarily for commercial purposes and are subject to regulation by Fisheries; steelhead trout are sought primarily by recreational fishermen, subject to Game's regulatory authority. The five salmon species and steelhead trout will be referred to collectively, unless otherwise noted, as "fish" or "salmon."

[6]The geographical area that is the subject of the treaties and this litigation is "that portion of the State of Washington west of the Cascade Mountains and north of the Columbia River drainage area, * * * [including] the American portion of the Puget Sound watershed, the watersheds of the Olympic Peninsula north of the Grays Harbor watershed, and the offshore waters adjacent to those areas. *Final Decision I,* supra n.2, 384 F.Supp. at 328.

Court here considers the hatchery and environmental issues which were raised in Phase I but reserved for decision in Phase II.[7] Currently pending are the parties' cross-motions for partial summary judgment on the hatchery issue and plaintiffs' motion for partial summary judgment on the environmental issue. Bound and informed by the numerous decisions heretofore rendered in this case, particularly the recent Supreme Court opinion, having found no genuine issue as to any material fact, and for the additional reasons set forth below, the Court concludes that plaintiffs are entitled to judgment as a matter of law on the hatchery issue and on that aspect of the environmental issue thus far presented for adjudication.

I

The treaties in question were negotiated between Isaac Stevens, the first Governor and first Superintendent of Indian Affairs of the Washington Territory, and tribal representatives. Few contemporaneous documents explicate the parties' intentions regarding the scope of and limitations on the tribes' fishing right. For the simple reason that fish were plentiful in 1854-1855 but have since become relatively scarce, the allocation, hatchery and environmental issues which all arise from the fact of scarcity were not addressed.[8] However, the extensive record developed in connection with this litigation and recounted in the many opinions issued to date provides considerable insight into the treaty negotiations. Preceding opinions have spelled out in impressive detail the parties' intentions and the surrounding circumstances, as well as relevant

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[7] *Final Decision I, supra* n.2, 384 F.Supp. at 328, 344-345.

[8] "Because of the great abundance of fish and the limited population of the area, it simply was not contemplated that either party would interfere with the other's fishing rights. The parties accordingly did not see the need and did not intend to regulate the taking of fish by either Indians or non-Indians, nor was future regulation foreseen." *Washington—Phase I, supra* n.2, 443 U.S. at 668, 99 S.Ct. at 3065, *citing Final Decision I, supra* n.2, 384 F.Supp. at 334, 355, 357.

subsequent events; only a capsule summary is necessary here.[9]

When the treaties were negotiated, fish were the mainstay of the Indians' economy and the focal point of their culture. "All of [the otherwise-diverse tribes] shared a vital and unifying dependence on anadromous fish." *Washington—Phase I, supra,* 443 U.S. at 664, 99 S.Ct. at 3064. *See also id.* at 665-666, 99 S.Ct. at 3064-3065 and other Phase I opinions cited therein.[10]

An essential element of consideration for which the Indians bargained was the right to continue fishing as they had always done. "It is perfectly clear * * * that they were invited by the white negotiators to rely and in fact did rely heavily onthe good faith of the United States to protect that right." *Id.* at 667, 99 S.Ct. at 3065.[11]

In 1854-1855, Indians constituted approximately 75 percent of the 10,000-person case area population and accounted for most of the fishing activity.[12] In 1974, Indians represented approximately 10.8 percent of case area's com-

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[9]The many facts regarding the construction of these treaties which were found and affirmed on appeal in Phase I are binding on the parties in this second phase of the case. *Puget Sound Gillnetters, supra* n.2, 573 F.2d at 1129; *Post-Trial Decisions, supra* n.2, 459 F.Supp. at 1094 (Memorandum Decision Denying Disqualification).

[10]Salmon (including steelhead trout), the fish covered by these treaties, are anadromous fish. They hatch in fresh water, spend their adult lives in the ocean, and then return to their native fresh-water streams to spawn and die. *Washington—Phase I, supra* n.2, 443 U.S. at 662-663, 99 S.Ct. at 3062-3063. Steelhead trout may return to spawn more than once before dying.

[11]The oft-quoted statement of Governor Stevens to the Indians negotiating the Treaty of Point-No-Point epitomizes this fact:

> "Are you not my children and also children of the Great Father? What will I not do for my children, and what will you not for yours? Would you not die for them? This paper is such as a man would give to his children and I will tell you why. This paper gives you a home. Does not a father give his children a home? * * * This paper secures your fish? [sic] Does not a father give food to his children?" *Washington—Phase I, supra* n.2, 443 U.S. at 667 n.11, 99 S.Ct. at 3065 n.11.

[12]*Id.* at 664, 99 S.Ct. at 3063.

mercial fishermen[13] and they netted 2.4 percent of the commercial catch.[14] The dramatic decline in the Indians' case-area fishing activity is attributable to such factors as the settlement of the West by predominantly non-Indians and the industrialization of fishing and related activities,[15] acculturation of Indians into non-Indian forms of employment,[16] belated access of Indian fishermen to the salmon runs by virtue of the location of Indians' fishing sites,[17] and the discriminatory manner in which state officials have applied fishing laws and regulations to Indian fishermen.[18]

The most salient effect of Phase I was to reverse this trend and place Indian fishermen on an equal footing with non-Indians. In February, 1974, following a month-long trial and several months of post-trial briefing and argument, Judge Boldt held that the treaty language securing to the Indians "the right of taking fish * * * in common with all citizens" entitles them to up to 50 percent of the harvestable fish passing through the tribes' usual and accustomed fishing grounds. *Final Decision I, supra,* 384 F.Sup. at 343-344. The quantity of harvestable fish subject to the 50/50 allocation between Indians and non-Indians was to be computed by subtracting the following categories of fish from all those within the case area: (1) fish taken on, rather than off of, Indian reservations; (2) fish taken at off-reservation sites other than the tribes' usual and accus-

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[13]When *Final Decision I* was issued in 1974, there were approximately 794 Indian fishermen and 6,600 commercial fishermen in the case area. By way of contrast, there were 283,650 sport fishermen. *Final Decision I, supra* n.2, 384 F.Supp. at 387. *See also Washington—Phase I, supra* n.2, 443 U.S. at 664, 99 S.Ct. at 3063.

[14]As of August, 1974, Indians harvested 89,402 salmon and non-Indian commercial fishermen harvested 3,628,513 during the 1974 season. *Post-Trial Decisions, supra* n.2, 459 F.Supp. at 1032 (Decision, Injunction and Order re State Court Injunctions).

[15]*Final Decision I, supra* n.2, 384 F.Supp. at 406-407.

[16]*Id.* at 358.

[17]*Id.* at 389.

[18]*Id.* at 388, 403-404. *See also Washington—Phase I, supra* n.2, 433 U.S. at 668-669, 99 S.Ct. at 3065-3066.

tomed fishing grounds; (3) fish taken by the tribes for ceremonial and subsistence needs; and (4) fish not to be taken at all but to "escape" for spawning or conservation purposes. In addition, Judge Boldt called for an equitable adjustment augmenting the tribes' share because non-Indians take a "substantially disproportionate" number of the fish caught offshore that would otherwise have passed through the tribes' fishing grounds. *Id.* at 344. Finally, Judge Boldt abstained from deciding whether hatchery-bred fish should be excluded from the allocable fish population. *Id.* at 344-345.[19] The Ninth Circuit affirmed Judge Boldt's allocation in all significant respects, modifying only the formula for computing the equitable adjustment. *United States v. State of Washington, supra,* 520 F.2d 676.[20] Initially, the Supreme Court denied *certiorari.* 423 U.S. 1086, 96 S.Ct. 877, 47 L.Ed.2d 97. However, the Court later reviewed Judge Boldt's rulings when a conflict arose between the Washington state courts, which enjoined the State's Department of Fisheries ("Fisheries") from enforcing regulations designed to implement the allocation decision, [21] and the federal courts, which had decreed and

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[19]In *Final Decision I,* Judge Boldt's consideration of the hatchery issue was limited to the question whether hatchery-bred *steelhead trout* should be excluded from the allocation. That question had been raised, but not answered, in *Puyallup II,* which concerned the application of the treaties' fishing clause to the State's attempts to regulate steelhead trout fishing. The hatchery issue thus entered this litigation collaterally, as a spin-off from *Puyallup II,* and was later broadened by the parties here to the question whether all hatchery-bred fish should be excluded from the allocation. *See Post-Trial Decisions, supra* n.2, 459 F.Supp. at 1072 (Memorandum Decision and Order Granting Preliminary Injunction re Hatchery Propagated Fish).

[20]The Ninth Circuit held that fish taken off-shore by non-Washington citizens should not be considered in calculating an equitable adjustment to the tribes' share. *United States v. State of Washington, supra* n.2, 520 F.2d 676, 689, 693 (9th Cir. 1975).

[21]*Washington State Commercial Passenger Fishing Vessel Ass'n v. Tollefson,* 89 Wash.2d 276, 571 P.2d 1373 (1977); *Purse Seine Vessel Owners Ass'n v. Moos,* 88 Wash.2d 799, 567 P.2d 205 (1977); *Puget Sound Gillnetters Ass'n v. Moos,* 88 Wash.2d 677, 565 P.2d 1151 (1977). These cases stymied Fisheries' attempts to implement Judge Boldt's decision; Game had not even attempted to adopt implementing regulations. The various efforts by the State courts, State agencies, and inter-

undertook directly to implement the treaty-based allocation.[22] The Court consolidated the state and federal court proceedings, affirmed and adopted Judge Boldt's construction of the treaties, and upheld, with slight modification, his allocation decision. *Washington—Phase I, supra.* The Court affirmed the Ninth Circuit's modification of the equitable adjustment formula, and further modified the computation of allocable fish by including: (1) fish taken on-reservation as well as those taken off-reservation; (2) fish taken off-reservation at sites other than the tribes' usual and accustomed fishing sites; (3) fish taken by the tribes for ceremonial and subsistence needs. *Id.*, 443 U.S. at 687-688, 99 S.Ct. at 3075-3076. The Court amplified the 50/50 allocation ruling by emphasizing that the crucial determinant of the tribes' treaty share is that quantity of fish sufficient to provide a moderate standard of living, subject to a ceiling of 50 percent of the harvestable fish.

> "[T]he 50% figure imposes a maximum but not a minimum allocation * * * [T]he central principle here must be that Indian treaty rights to a natural resource that once was thoroughly and exclusively exploited by the Indians secures so much as, but no more than, is necessary to provide the Indians with a livelihood—that is to say, a moderate living." *Id.* at 686, 99 S.Ct. at 3075.

See also Final Decision I, supra, 384 F.Supp. at 401-402. Finally, the Court noted that this Court had not yet reached a final decision on the hatchery issue and therefore expressed no opinion as to "whether the treaties give Indians the same right to take hatchery-bred fish as they

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ested organizations to undermine and nullify Judge Boldt's rulings (and the Ninth Circuit's affirmance thereof) were described by the Ninth Circuit as "the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century," save for some desegregation cases. *Puget Sound Gillnetters, supra* n.2, 573 F.2d at 1126. *See generally id.* at 1128-1130; *Washington—Phase I, supra* n.2, 443 U.S. at 672-674, 99 S.Ct. at 3067, 3068.

[22] *Post-Trial Decisions, supra* n.2, *various appeals dismissed,* 573 F2d 1117 (9th Cir. 1978), 573 F.2d 1118 (9th Cir. 1978), 573 F2d 1121 (9th Cir. 1978), decisions at 459 F.Supp. 1097-1118, *aff'd sub nom. Puget Sound Gillnetters,* 573 F.2d 1123 (9th Cir. 1978).

do to take native fish." *Id.*, 443 U.S. at 689 n.30, 99 S.Ct. at 3076 n.30.

In August, 1976, several months after the Supreme Court denied *certiorari* in the first round of Phase I, the plaintiffs formally commenced Phase II by filing amended and supplemental complaints. The State responded with an answer and counterclaim. The issues were further refined through joint and separate statements of the issues to be resolved in Phase II. After considerable discovery and pretrial preparation, the plaintiffs moved for partial summary judgment on the issue "whether the federal treaty fishing right reserves to treaty tribes a right to have the fishery resource protected from adverse environmental actions or inactions of the State of Washington."[23] Excluded from the scope of the plaintiffs' motion, and not yet presented to the Court for resolution, are two subsidiary environmental issues: (1) whether, if such right exists, the State has violated it; and (2) what remedies, if any, are appropriate. After extensive briefing by all parties, the Court heard oral argument on May 11, 1979. The Supreme Court's opinion in the second round of Phase I was handed down two months thereafter, and the parties submitted additional briefs regarding the significance of that opinion in relation to the pending environmental issue.

Following a status conference in September, 1979, the parties filed cross-motions for summary judgment on the issue "whether the federal treaty fishing right includes all, some or no artificially-reared fish released into public waters."[24] Each party supported its motion with statements of facts and legal contentions, briefs, and affidavits[25] in accordance with the procedures outlined in Section 3.30 of the Manual for Complex Litigation. Oral argument took place on April 10, 1980, and, after the parties filed supplementary factual material, both the hatchery and the environmental issues were deemed submitted.

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[23]Joint Statement of Issues, 1.1 (June 23, 1978). *See also* III.1-7.

[24]*Id.*, 1.4. *See also* 1.5-6, III.8. and IV.1-2.

[25]The State moved to strike all or portions of eight of the nine affidavits submitted by plaintiffs. The State objects to Alan Stay's affi-

II

In analyzing the allocation issue in Phase I, it was possible to rely on the express language of the treaties, as well as the parties' intentions and surrounding circumstances, in construing the treaties' fishing clause. In particular, the 50/50 allocation between treaty and nontreaty fishermen was derived from the "in common with" provision in that clause. *Washington—Phase I, supra,* 443 U.S. at 685-686, 99 S.Ct. at 3074-3075; *Final Decision I, supra,* 384 F.Supp. at 343. However, none of the express terms in the fishing clause pertain to the hatchery or environmental

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davit on the ground that it does not lay a proper foundation for the government report attached thereto. Plaintiffs filed two affidavits of Mr. Stay. One, dated January 21, 1980, identifies an attached document. The other, dated March 7, 1980, summarizes data he received from the Northwest Indian Fisheries Commission. In response to the State's motion to strike, the plaintiffs withdrew the latter Stay affidavit and replaced it with the affidavit of Michael Grayum, Assistant Director for Fishery Management Services of the Northwest Indian Fisheries Commission. Although this substitution of affidavits does not address the State's objections to the first Stay affidavit, the Court independently denies the motion to strike that affidavit. The attached document is adequately authenticated and therefore admissible for purposes of the summary judgment motion. The State objects to plaintiffs' remaining affidavits (*i.e.*, those of Howard Carlisle, Donald Chapman, Howard Droker, William Hershberger, Barbara Lane, Peter Larkin, and Phillip Mundy) on the grounds that they are not relevant or material (insofar as they pertain to historical events or environmental conditions), are not competent (insofar as the affiants state their own opinions), and are speculative (insofar as conclusions are not supported by facts). The Court denies the State's motion to strike these affidavits. The objections generally lack merit and, to the extent that they are meritorious, the affidavits need not be striken. Specifically, the Court overrules the State's relevance objection. The historical and environmental information is relevant to determining the relationship between hatchery-bred fish and the wild fish that are indisputably subject to the treaty. The State's competency objection is overruled because the relevant affiants are experts. The State's strongest argument is that plaintiffs' affidavits lack sufficient factual support. However, this does not call for the striking of the affidavits because the parties' posthearing submissions adequately supplement the factual bases underlying the *material* facts stated in the affidavits. Moreover, many of the objected-to statements in plaintiffs' affidavits do not pertain to facts material to the resolution of the hatchery issue. All parties agreed at oral argument that there are no genuine issues of material fact precluding resolution of the hatchery issue by way of summary judgment. Finally, the Court has relied on plaintiffs' affidavits only as and where they are cited herein.

issues. Canons of interpreting Indian treaties accordingly assume especial significance in ascertaining the treaties' implicit meaning with respect to those issues.

[1-3] Indian treaties must be interpreted so as to promote their central purposes. *United States v. Winans*, 198 U.S. 371, 381, 25 S.Ct. 662, 664, 49 L.Ed. 1089 (1905). They must be read "in light of the common notions of the day and the assumptions of those who drafted them." *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206, 98 S.Ct. 1011, 1020, 55 L.Ed.2d 209 (1978). The Supreme Court has been notably attentive to the intentions and assumptions of the Indians as they entered into the treaties.

> "[T]he United States, as the party with the presumptively superior negotiating skills and superior knowledge of the language in which the treaty is recorded, has a responsibility to avoid taking advantage of the other side. '[T]he treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.' " *Washington—Phase I, supra*, 443 U.S. at 675-676, 99 S.Ct. at 3069-3070, *quoting in part from Jones v. Meehan*, 175 U.S. 1, 11, 20 S.Ct. 1, 5, 44 L.Ed. 49 (1899).

See also Tulee v. Washington, 315 U.S. 681, 684-685, 62 S.Ct. 862, 864, 86 L.Ed. 1115 (1942). Any ambiguities must be resolved in the Indians' favor; "the wording of treaties * * * with the Indians is not to be construed to their prejudice." *Antoine v. Washington*, 420 U.S. 194, 199, 95 S.Ct. 944, 948, 43 L.Ed. 2d 129 (1975). *See also Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631, 90 S.Ct. 1328, 1334, 25 L.Ed. 2d 615 (1970). The Supreme Court has repeatedly relied on the rule of attending to the Indians' common-sense understanding of the treaties "in broadly interpreting these very treaties in the Indians' favor." *Washington—Phase I, supra*, 443 U.S. at 676, 99 S.Ct. at 3070.

III

A

Prior to 1973, the State had never drawn a distinction

in either its legal arguments or its fisheries programs between natural and hatchery-bred fish. The State initially proposed that distinction in oral argument before the Supreme Court in a case involving discriminatory state regulation of steelhead trout fishing in the Puyallup River. In the course of striking down the state regulation as impermissible infringement upon the Puyallup Tribe's treaty-based fishing right, the Supreme Court expressly reserved ruling on whether the existence of a license fee-funded hatchery program should affect the allocation of steelhead trout under the fishing clause. *Department of Game v. Puyallup Tribe,* 414 U.S. 44, 48, 94 S.Ct. 330, 333, 38 L.Ed.2d 254 (1973) ("Puyallup II").[26]

In a concurring opinion, three Justices suggested that the Indians' treaty right should not extend to hatchery fish subsidized by non-Indian sport fishermen. *Id.* at 49-50, 94 S.Ct. at 333-334.

On remand, the State courts converted that suggestion into a ruling. *Department of Game v. Puyallup Tribe,* No. 158069 (Super.Ct. 1975), *aff'd* 86 Wash.2d 664, 548 P.2d 1058 (1976). Although the *Puyallup* litigation involved fishing by the Puyallup Tribe (but not the other 20

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[26]In *Puyallup I, supra* n.3, the Supreme Court held that off-reservation treaty fishing is subject to State regulation, limited to "nondiscriminatory measures for conserving fish resources." *Id.*, 391 U.S. at 399, 88 S.Ct. at 1729. The case was remanded to the State courts, giving rise to *Puyallup II,* for the determination of whether the challenged regulation (a ban on set net fishing) was necessary for conservation purposes and whether it was nondiscriminatory. The State courts upheld the regulation, 80 Wash.2d 561, 497 P.2d 171 (1972), but the Supreme Court struck it down as discriminatory "because all Indian net fishing is barred and only hook-and-line fishing entirely preempted by non-Indians, is allowed." *Puyallup II, supra* n.3, 414 U.S. at 48, 94 S.Ct. at 333. The case was again remanded to establish a formula for apportioning the steelhead fishery between Indians and non-Indians. The State courts held that the state could regulate tribal fishing on as well as off of the reservation, and a limitation was imposed on the number of steelhead trout that treaty fishermen could catch each year. 86 Wash.2d 664, 548 P.2d 1058 (1976). The Supreme Court held that although the tribe was immune from suit under the doctrine of sovereign immunity, the individual members of the tribe were proper parties and were subject to regulation by the state both on as well as off of their reservation. *Puyallup III, supra* n.3.

tribes that are parties to this litigation) for steelhead trout (but not the other five species of salmon that are the subject of this litigation) in the Puyallup River (but not the entire case area), the State moved to exclude all hatchery fish from the 50 percent treaty share to which Judge Boldt had declared all of the Indians in this case to be entitled. Judge Boldt then enjoined the State from extending the State court's holding beyond the *Puyallup* parties and subject matter. *Post-Trial Decisions, supra,* 459 F.Supp. at 1042 (following Pierce County Superior Court decision) and at 1072 (following Washington Supreme Court decision). When the State court's ruling was reviewed by the Supreme Court, the case was decided on other grounds and the Court again declined to address the hatchery issue. *Puyallup Tribe v. Department of Game,* 433 U.S. 165, 177 n.17, 97 S.Ct. 2616, 2623-2624 n.17, 53 L.Ed.2d 667 (1977) *("Puyallup III").* In short, none of the numerous federal opinions in the *Puyallup* trilogy addresses the merits of the hatchery issue; neither the governing law nor the applicable facts were discussed, much less adjudicated. *See Post-Trial Decisions, supra,* 459 F.Supp. at 1079 (Memorandum Decision and Order Granting Preliminary Injunction re Hatchery Propagated Fish). Throughout Phase I, which was litigated concurrently with *Puyallup II and III,* hatchery fish have been legally indistinguishable from natural fish.

B

Although the legal status of hatchery fish did not assume significance until 1973, the State's hatchery program has been in existence since 1895.[27] The hatchery activities of the Fisheries and Game Departments have steadily increased since that time, particularly in the more recent

[27]The first salmon hatchery in Washington was built in 1895 and the first steelhead trout hatchery activity commenced in 1903. Plaintiffs' fact statement 27, defendants' fact statements 23.3 and 14.1 and corresponding admissions thereof. (The fact statements and admissions are contained in the parties' Manual § 3.30 briefs. Each side presented its own statement of facts and legal contentions, to which the other side responded by admission, denial, or objection.)

years.[28] Currently, the State operates 19 steelhead trout and 16 salmon hatcheries in the case area.[29] Another 16 facilities provide limited salmon production assistance.[30] The State-run facilities are funded by federal and local, as well as State, monies.[31]

Additional hatcheries in the case area are operated by entities other than the State. Some facilities are sponsored by the United States Fish and Wildlife Service, some are sponsored by various tribal governments, and others are cooperative ventures between the State and tribes or private parties.[32]

An estimated 371,000,000 salmon and 8,755,000 steelhead trout were released into the State's waters from federal, State, tribal, and all other hatcheries during the

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[28]*See generally* defendants' fact statements 15, 20, 23, 28, 31 (including subparts) and 21.6, and corresponding admissions.

[29]Defendants' fact statements 15.15 and 23.8-23.9, and corresponding admissions.

[30]Defendants' fact statement 27.3 and corresponding admission. The 16 full-scale hatcheries in the case area are called primary units and they "have the capacity to collect, hold and spawn adults, to incubate eggs, and to hatch and rear juvenile salmon." The other 16 facilities are satellites of each of the primary units and they have "racks, rearing and/or holding ponds." Defendants' fact statements 27.2-27.3, and corresponding admissions.

[31]Although the record does not presently establish, beyond dispute, the precise share of the federal and local contributions to the State's hatchery program, the *fact* of such contributions is undisputed. *See* State's proposed stipulation of facts § III, and plaintiffs' response to Court's request for additional informat[illegible] at 17-23. (At the hatcheries hearing on April 10, 1980, the Court directed the parties to submit a supplementary stipulation of facts in response to three specific questions. Each side subequently filed a separate response. With respect to the first and second questions, the parties are in substantial agreement. The plaintiffs have not responded to the third question because they claim to lack the requisite data. The discrepancies between the parties' submissions do not preclude summary judgment because there is no dispute regarding the *relevant* use of the data — to illustrate the patterns and trends characterizing the State's hatcheries program. For the purposes of the plaintiffs' motion for summary judgment, all real and apparent factual disputes are resolved herein in favor of the State.)

[32]State's proposed stipulation, § II (as amended by letter of August 15, 1980), and plaintiffs' response, Table II-1.

1978-1979 season (*i.e.*, July 1978-June 1979).[33] Hatchery fish presently account for 60 percent of the steelhead and 17 percent of the salmon in the case area.[34] The relative size of the hatchery population varies considerably among the different salmon species; hatchery fish constitute as much as 63 percent of the chinook in the case area and there are virtually no hatchery-propagated pink and sockeye salmon.[35] Because salmon return to their native streams to spawn, the placement of hatcheries has a tremendous impact on the proportion of propagated and natural fish in each geographically distinct population.

Once released from hatchery facilities, artificially-bred fish mature and reproduce in the same manner as natural fish. Hatchery and natural stocks of the same species often occupy the same harvest management area at the same time.[36] Hatchery and natural fish generally resemble each other, although sophisticated techniques are being developed to attempt to differentiate between them.[37] Whether such techniques are reasonably accurate or economically feasible is not yet established.[38] In its motion for summary judgment, the State seeks to exclude from the population of allocable fish the "first generation" of hatchery-produced fish. Subsequent generations, who spend their entire life cycle in the natural environment, are undisputedly included in the tribes' treaty share.[39]

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[33]Supplemental affidavit of Robert Hager, attachment 2, at 3.

[34] State's proposed stipulation, § II (as amended by letter of August 15, 1980), and plaintiffs' response, Table II-1.

[35]*Id.*

[36]Plaintiffs' fact statements 191, 194, and corresponding admissions.

[37]Defendants' fact statement 8 (and subparts), and corresponding admissions.

[38]*Id.*, especially defendants' fact statements 8.2, 8.3, and 8.5, and corresponding admissions, denials, and explanatory comments.

[39]Defendants' brief of March 7, 1980, re hatchery fish summary judgment at 3.

C

[4] The Court concludes that all hatchery fish must be included in the computation of the tribes' treaty share in order to effectuate the parties' intent and the purposes of the fishing clause. The Supreme Court's recent reaffirmation of the long-standing view that the treaties were designed to guarantee the tribes an adequate supply of fish goes far toward resolving the hatchery issue.

> "Governor Stevens and his associates were well aware of the 'sense' in which the Indians were likely to view assurances of their fishing rights. During the negotiations, the vital importance of the fish to the Indians was repeatedly emphasized by both sides, and the Governor's promises that the treaties would protect the source of food and commerce were crucial in obtaining the Indians' assent. It is absolutely clear, as Governor Stevens himself said, that neither he nor the Indians intended that the latter 'should be excluded from their ancient fisheries,' and it is accordingly inconceivable that either party deliberately agreed to authorize future settlers to crowd the Indians out of any meaningful use of their accustomed places to fish." *Washington—Phase I, supra*, 443 U.S. at 676, 99 S.Ct. at 3070 (citations omitted).

The only express limitation on the tribes' right of taking fish is the requirement to share the harvest "in common with" non-Indians. The only implicit limitations on that right are the tribes' moderate living needs, the State's power to impose conservation measures necessary to preserve the resource, and the physical availability of fish. *Id.* at 686-689, 99 S.Ct. at 3075-3076; *Final Decision I, supra*, 384 F.Supp. at 401-402. No court has implied any additional limitations based on the species or *origin* of the fish, or the purpose, manner, or timing of the taking. *Id.*

It is not beyond dispute that natural fish have become relatively scarce, due at least in part to the commercialization of the fishing industry and the degradation of the fishing habitat caused primarily by non-Indian activity in the case area.[40] The record also establishes that the State has

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[40] *Washington—Phase I, supra* n.2, 443 U.S. at 668-669, 99 S.Ct. at

developed and promoted its artificial propagation program in order to replace the fish that were artificially lost. In 1977, the State described its hatchery program as follows:

> "Salmon hatcheries * * * are a means of combating losses of fish life caused by environmental changes. They are an aid to crippled streams in producing fish, occasionally a substitute for them. Because of competitive water, land, and forest exploitation, it has been necessary to develop controlled methods of sustaining or rehabilitating the stocks of fish which inhabit fresh water streams."[41]

The mitigation purpose of the State's hatchery program has been echoed throughout its history. This statement by a Fisheries spokesman in 1946 typifies the statements and publications frequently issued by the State:

> "The present purpose of the salmon hatchery is not to replace nature, nor to eliminate it, but to supplement the work of nature in places where the works of man have caused an unnatural situation which reduces the effectiveness of natural propagation. Hatcheries are intended to replace the production of streams destroyed by dams, diversions, pollution, or obstructions, and to build up the runs and streams that are not producing to full capacity."[42]

See also Post-Trial Decisions, supra, 459 F.Supp. at 1074, 1081 (hatcheries injunction). It is equally evident that hatchery fish represent an ever-increasing proportion of the total fish population in the case area. Whereas hatchery-bred steelhead trout accounted for 10 percent of all steelhead trout in 1950, their representation rose to 20 percent in 1960, 40 percent in 1970, and 60 percent in 1980.[43]

3065-3066; *Post-Trial Decisions, supra* n.2, 459 F.Supp. at 1079-1080 (hatchery injunction); *Final Decision I, supra* n.2, 384 F.Supp. at 334, 353 (' 13.3). *See also* section V.A., *infra*.

[41]Affidavit of Howard Droker at 8, quoting State publication entitled "Salmon Hatcheries."

[42]Droker affidavit at 5, quoting speech by Jack Hurley. *See generally* Droker affidavit.

[43]State's proposed stipulation, § 1 (plaintiffs contend that accurate data from which to compute accurate percentages is not available. Plaintiffs' response at 9).

According to the chief of the Game Department's Fisheries Management Division:

> "Hatchery-reared winter-run steelhead make up a high percentage of the catch of steelhead in the state with some of the heavily planted rivers showing hatchery returns contributing up to 90% of the catch * * *. *Overall it appears likely that hatchery steelhead will continue to contribute significantly to the harvests, while the numbers of wild fish will most likely decline.*"[44]

The inescapable conclusion is that if hatchery fish were to be excluded from the allocation, the Indians' treaty-secured right to an adequate supply of fish[45]—the right for which they traded millions of acres of valuable land and resources—would be placed in jeopardy. The tribes' share would steadily dwindle and the paramount purpose of the treaties would be subverted. Contrary to what the Supreme Court held to be the parties' intentions, nontreaty fishermen would ultimately "crowd the Indians out of any meaningful use of their accustomed places to fish." *Washington—Phase I, supra*, 443 U.S. at 676-677, 99 S.Ct. at 3070.

D

None of the arguments advanced by the State calls for the exclusion of hatchery fish from the treaty allocation. First, the State focuses on the intentions of the negotiators. Proceeding on the accurate assumption that neither the Indians nor the federal officials conceived of artificial propagation facilities when the treaties were drafted in 1854 and 1855,[46] the State argues that the Indians' concepts of property rights were such that, if they had divined the advent of hatcheries, they would not have pre-

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[44]Affidavit of Jack Ayerst, attachment 1, at 3, 19 (emphasis added).

[45]"Indian treaty rights * * * secures [sic] so much as * * * is necessary to provide the Indians with a livelihood—that is to say, a moderate living." *Washington—Phase I, supra* n.2, 443 U.S. at 686, 99 S.Ct. at 3075.

[46]Plaintiffs claim that the easterners who negotiated the treaties on behalf of the United States would have known about the decline of the

sumed to be entitled to State-funded hatchery fish. In short, the State contends that the tribes subscribed to the doctrine that one may claim the fruits of his own labor. The record establishes that the Indians recognized exclusive property interests in land and in sedentary resources.[47] However, the Indians viewed migratory fish and animals differently from stationary ones. The right to take fish existed when, and only when, the fish were within or passing through a tribes' particular territory.[48] Indians attempted to "enhance" their fish supply by religious means,[49] but there is no evidence that those who participated in enhancement activities attained any superior or exclusive interests in the fish for whose arrival they had prayed.[50]

The State attempts to bolster its interpretation of the parties' intent by referring to the shellfish proviso that was tacked onto the fishing clause:

Atlantic salmon fishery and the introduction of hatcheries in the East. However, the only support for this contention are some highly-speculative comments of anthropologist Barbara Lane, who in turn relied primarily on one book written by a Canadian in 1856. *See* Lane affidavit at 3-4. This material is insufficient to raise a genuine dispute of fact or to require reconsideration of the Supreme Court's finding that "[b]ecause of the great abundance of fish and the limited population of the area, it simply was not contemplated that either party would interfere with the other's fishing rights." *Washington—Phase I, supra* n.2, 443 U.S. at 668, 99 S.Ct. at 3065. *Cf.* affidavit of Anthony Netboy at 5-6.

[47]Plaintiffs' fact statements 111-117, 120-121, 137-138, defendants' fact statements 10.1-10.5, 11.3, and corresponding admissions.

[48]Lane affidavit at 7-10. In contrast to Dr. Lane's conjectural remarks regarding the eastern negotiators' knowledge of hatchery facilities (*e.g.*, they "likely knew" (at 4), "it is reasonable to assume" (at 7)), her statements regarding the Indians' customs are more solidly based, more squarely within her expertise, and more closely akin to her reports and testimony which Judge Boldt praised and on which he expressly relied in Phase I. *See Final Decision I, supra* n.2, 384 F.Supp. at 350 and *passim*. Although the State purports to deny plaintiffs' fact statements 118-119 regarding the Indians' property concepts applicable to migratory fish, the State provides no supporting facts sufficient to contradict the Lane affidavit or to raise a genuine dispute as to this fact.

[49]Plaintiffs' fact statements 122, 124, and corresponding admissions.

[50]Defendants' bare denial of plaintiffs' fact statement 130 is insufficient to create a genuine dispute in light of plaintiffs' supporting material in the Lane affidavit at 8-9.

> "The right of taking fish * * * is further secured to said Indians, * * * *Provided, however*, That they shall not take shell fish from any beds staked or cultivated by citizens."

The State argues that the shellfish proviso illustrates the parties' intent to deny the Indians access to resources created or enhanced by non-Indian efforts. Again the State misperceives the tribes' notions of property law. As described above, Indians considered shellfish, as sedentary creatures, to be the exclusive province of the tribe within whose territory they were located. Thus, the proviso imposed no limitation on the Indians' then-existing activities because only resident tribe members were entitled to take local shellfish. Rather, the function of the proviso was to enable non-Indian settlers to establish their own, exclusive ownership of shellfish beds and storage areas that might have otherwise belonged to the tribes.[51] The shellfish proviso carved an exception into the Indians' rule that a tribe had exclusive use of sedentary resources within its territory. It did not reflect the adoption of the conceptually-distinct rule, urged here by the State but not recognized in 1854-1855 by the Indians, that one who cultivates a resource thereby gains an exclusive ownership interest in it.

Next, the State focuses on the fact that the tribes' fishing right is a reserved, rather than a granted, right. That is, the treaties authorized the Indians to continue to exercise their preexisting right to take fish; they did not create new or additional fishing rights for the tribes. This characterization of treaty rights has long been established beyond cavil. *See, e. g., United States v. Winans, supra*, 198 U.S. at 381, 25 S.Ct. at 664, *quoted approvingly in Washington—Phase I, supra*, 443 U.S. at 680, 99 S.Ct. at 3071. The State invokes it here to claim that because hatcheries were neither in existence nor in the parties' contemplation when the treaties were signed, the Indians could not have reserved the right to take hatchery fish. This claim contravenes considerable case law and is directly refuted by *Winans*, the leading case on which the

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[51]Lane affidavit at 9.

state relies regarding the nature of reserved rights.

In *Winans*, private parties constructed a state-licensed fish wheel on the Columbia River and thereby foreclosed the Yakima Indians from fishing at some of their usual and accustomed places. The Supreme Court held that it violated the fishing clause of the Treaty with the Yakimas (one of the treaties in issue here) for the non-Indians to use "modern" devices which have the effect of preempting the tribes' fishing right.

> "New conditions came into existence, to which those [fishing] rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. * * *
> * * * In the actual taking of fish white men may not be confined to a spear or crude net, but it does not follow that they may construct and use a device which gives them exclusive possession of the fishing places." *Winans, supra*, 198 U.S. at 381-382, 25 S.Ct. at 664.

In Phase I of this case, the Supreme Court stated that "even more significant than the language in *Winans* is its actual disposition. * * * [I]t assured the Indians a share of the fish." *Washington—Phase I, supra*, 443 U.S. at 681, 99 S.Ct. at 3072. Clearly, the treaties reserved to the tribes more than a share of the 1854 and 1855 salmon runs; they also reserved the right to share in all future runs. In light of the fact that hatchery-bred fish constitute an ever-increasing proportion of the relatively-stable total catch, hatchery fish must be included in the tribes' allocation in order to "assure the Indians a share of the fish."

Finally, the State contends that it has regulatory and ownership interests in hatchery fish and that neither the treaties nor any subsequent enactment has preempted such interests. With respect to the State's asserted regulatory interest, it has been firmly established that the State's authority to regulate treaty fishing extends no further than the imposition of nondiscriminatory, necessary conservation measures. *See Puyallup* trilogy, *supra; Final Decision I, supra*, 384 F.Supp. at 333, 339, 342, 345-347, 401-403. The State has not claimed that it seeks to regulate the allocation of hatchery fish in order to conserve the re-

source. Rather, the State believes that because it provides funding for (at least part of) its hatchery program, its authority to regulate hatchery fish is not limited to conservation measures. The crux of the State's argument is that it has bought its way out of the obligation to respect the tribes' treaty rights.[52] Both the premise and the conclusion of this argument are fallacious. First, the State's use of the term "regulate" is inappropriate. The State does not seek to control the time, manner, location, or extent of hatchery-fish fishing; it wishes to control the allocation of hatchery fish.[53] Second, it is too late in the day to challenge the fact, recently reaffirmed in Phase I, that the treaty governs the allocation of fish. Under the Supremacy Clause of the Constitution, the State is bound by the allocation decreed pursuant to the treaty. In the absence of a claim that hatchery fish must be excluded from the allocation in order to preserve the resource, the State's police powers are not implicated in the determination whether hatchery fish are "fish" for purposes of the treaty allocation.

Ultimately, the State is asserting an ownership interest in hatchery fish. This argument must fail as a matter of law. As the State concedes, the Supreme Court has flatly rejected the notion that a state owns fish swimming within its waters.

> " '[T]o put the claim of the State upon title is,' in Mr. Justice Holmes' words, 'to lean upon a slender reed.' A State does not stand in the same position as the owner of a private game preserve and it is pure fantasy to talk of 'owning' wild fish, birds, or animals. Neither the State nor the Federal Government, any more than a hopeful fisherman or hunter, has title to these creatures until they are reduced to possession by skillful capture." *Douglas v. Seacoast Products,*

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[52]*See* defendants' brief of March 7, 1980, re hatchery fish summary judgment at 11-14; defendants' legal contentions III (and subparts).

[53]Instead of the 50/50 basis for allocating treaty fish between tribal and nontribal fishermen, the State would allocate hatchery fish on an equal opportunity basis. The Supreme Court has consistently rejected the equal opportunity approach to allocation under the treaties. *Washington—Phase I, supra* n.2, 443 U.S. at 679-685, 99 S.Ct. at 3071-3074, and cases cited therein.

> *Inc.* 431 U.S. 265, 284, 97 S.Ct. 1740, 1751, 52 L.Ed.2d 304 (1977) (citations omitted).

See also Hughes v. Oklahoma, 441 U.S. 322, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1979). The State invites this Court to limit *Douglas* and *Hughes* to natural fish and to reinstate with respect to hatchery fish the nineteenth-century rule that a state owns its public resources. Whatever merit the State's argument might have when applied to fish confined within hatchery facilities, it has no logical application to harvestable fish that have been released from such facilities and are freely swimming alongside naturally-bred fish in the State's rivers, streams, and bays. The State acknowledges that private hatchery owners have no ownership interest in fish released into public waters.[54] Both *Douglas* and *Hughes* counsel against the recognition of any ownership interests in the State with respect to hatchery fish that have been released from the State's possession.

The State attempts to overcome the import of *Douglas* and *Hughes* by relying on two recent takings cases. Its reliance is misplaced. In *Kaiser Aetna v. United States*, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979), and *Vaughn v. Vermillion Corp.*, 444 U.S. 206, 100 S.Ct. 399, 62 L.Ed.2d 365 (1979), the Supreme Court held that when a private party builds channels on private property with private funds, the fact that such channels ultimately join with navigable waterways does not render the private channels subject to public access as if public waterways. These cases do not suggest that the investment of state funds in hatchery facilities would give rise to state ownership of hatchery-bred, but since-released, fish. First, the Court distinguished between privately-constructed projects that replace preexisting navigable waterways and those that do not involve the destruction and replacement of public waterways. Whereas a private ownership interest exists in the latter situation, the Court suggested that it might well not exist in the former situation. *Vaughn, supra*, 100 S.Ct. at 401. This case is more closely analogous

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[54]Defendants' brief on March 7, 1980, re hatchery fish summary judgment at 13.

to the former situation, if it is in any way analogous to the waterways cases, because hatchery fish are produced in order to replace depleted natural stocks. Second, both *Kaiser* and *Vaughn* involved the relationship between private parties and the federal government for purposes of the Takings Clause. This case involves the relationship between a state and Indian tribes and no takings issue is present. Third, there is a significant difference between requiring a private property owner to grant the public access *to* his property after his improvements have been connected to public property, which the Supreme Court held in *Kaiser* and *Vaughn* could not be done without providing just compensation, and entitling a state to claim ownership of hatchery fish once they are released *from* a hatchery facility and swimming freely in public waters.

The legal conclusion that the State lacks an ownership interest in released hatchery fish is reinforced by the factual circumstances of this case. Although the state provides considerable funding for its hatchery program, it is undisputed that federal and local governments as well as private parties also contribute to the construction and operation of State-run hatcheries.[55] In addition, the State's hatcheries supply only a portion of the hatchery fish population; federal, tribal, private, and cooperative (State-private, State-tribal) hatcheries account for approximately 25 percent of the hatchery-bred steelhead and 22 percent of the hatchery-bred salmon in the case area.[56] It would be inequitable and contrary to the spirit and intent of the treaties were the State-produced hatchery fish to be exempt from the treaties' "in common with" sharing requirement while hatchery fish supported by tribal and federal funds would be divided equally between the tribes and all other State citizens.

Moreover, the inclusion of hatchery fish in the allocation need not affect nontreaty fishermen adversely. The Supreme Court plainly stated that the measure of the

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[55]*See supra* n.31.

[56]State's proposed stipulation, § II (as amended by letter of August 15, 1980), and plaintiffs' response, Table II-1.

tribes' treaty share is that quantity of fish sufficient to provide them with a moderate standard of living, subject to a maximum share of 50 percent of the total catch. *Washington—Phase I, supra*, 443 U.S. at 686-687, 99 S.Ct. at 3075. For every hatchery fish taken to satisfy the tribes' moderate living needs, an additional natural fish is available to the nontreaty fishermen. Under the moderate needs test, inclusion of hatchery fish would alter the composition but not the size of the tribes' allocation. In conclusion, the Court holds that hatchery fish are "fish" within the meaning of the treaties' fishing clause and consequently are subject to allocation thereunder.

IV

A

From the numerous opinions rendered in Phase I, and the application of the principles enunciated therein to the hatchery issue, flows the resolution of the remaining issue in Phase II—the environmental issue. As previously noted, the only aspect of this issue presently before the Court is the legal question whether the tribes' fishing right includes the right to have treaty fish protected from environmental degradation. Plaintiffs' pending motion for partial summary judgment does not reach the additional questions whether the State is violating the tribes' alleged environmental right and what relief may be warranted.[57] This motion was briefed and argued prior to the issuance of the Supreme Court's Phase I decision, which essentially rejected the principal assumptions underlying the State's arguments here.

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[57]Plaintiffs have suggested that the declaratory judgment sought in connection with this motion may, as a practical matter, dispose of the entire environmental issue regardless of in whose favor that judgment is entered. Plaintiffs seek only prospective relief and, in light of the State's pledge to abide by the ruling in this case, implementation of declaratory judgment may well resolve the underlying dispute without the necessity of further court proceedings.

[5] At the outset, the Court holds that implicitly incorporated in the treaties' fishing clause is the right to have the fishery habitat protected from man-made despoliation. Virtually every case construing this fishing clause has recognized it to be the cornerstone of the treaties and has emphasized its overriding importance to the tribes. *See Washington—Phase I, supra,* 443 U.S. at 664-667, 675-681, 99 S.Ct. at 3063-3065, 3069-3072, and cases cited therein. The Indians understood, and were led by Governor Stevens to believe, that the treaties entitled them to continue fishing in perpetuity and that the settlers would not qualify, restrict, or interfere with their right to take fish. *Final Decision I, supra,* 384 F.Supp. at 334, 355-357.

The most fundamental prerequisite to exercising the right to take fish is the existence of fish to be taken. In order for salmon and steelhead trout to survive, specific environmental conditions must be present. A fisheries study prepared jointly by the State and federal government identifies at least five such conditions: "(1) access to and from the sea, (2) an adequate supply of good-quality water, (3) a sufficient amount of suitable gravel for spawning and egg incubation, (4) an ample supply of food, and (5) sufficient shelter."[58] It is undisputed that "alteration of even one of these essential, finely-balanced requirements will affect the production potential."[59] It is also undisputed that these conditions have been altered and that human activities have seriously degraded the quality of the fishery habitat.

> "Over the years, there has been a gradual deterioration and loss of natural fish production habitat in Washington State streams. Although there are many individual factors contributing to this, the general trend toward reduced production habitat is more the result of a combination of activities performed by

[58]United States Fish and Wildlife Service, Washington Department of Fisheries, and Washington Department of Game, *Joint Statement Regarding the Biology, Status, Management, and Harvest of the Salmon and Steelhead Resources of the Puget Sound and Olympic Peninsular Drainage Areas of Western Washington* (1973) ("Joint Biology Statement") at 17.

[59]*Id.*

> man—activities which alter and destroy one or more habitat conditions required for successful fish production. Generally, these factors can be categorized under the broad headings of watershed alterations, water storage dams, industrial developments, stream channel alterations, and residential developments.
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> A century ago, salmon abounded in the Pacific Northwest. Almost every accessible area, even in the deep interior, nurtured crops of salmon which renewed themselves as they had for millennia. However, in the Twentieth Century the urbanization and intensive settlement of the area, the rapid development of water power, lumbering and irrigation and the pollution of the watersheds reduced the quality and amount of accessible spawning grounds. These activities also reduced the rearing capacity of the streams."[60]

Were this trend to continue, the right to take fish would eventually be reduced to the right to dip one's net into the water * * * and bring it out empty. Such result would render nugatory the nine-year effort in Phase I, sanctioned by this Court, the Ninth Circuit, and the Supreme Court, to enforce the treaties' reservation to the tribes of a sufficient quantity of fish to meet their fair needs. The Supreme Court all but resolved the environmental issue when it expressly rejected the State's contention, initially reiterated on this motion, that the treaty right is but an equal opportunity to try to catch fish. Rather, the Court held that the treaty assures the tribes something considerably more tangible than "merely the chance * * * occasionally to dip their nets into the territorial waters." *Washington—Phase I, supra,* 443 U.S. at 679, 99 S.Ct. at 3071.[61]

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[60] *Id.* at 20, 78.

[61] The Supreme Court's use of the term "harvestable" in describing the population of allocable fish did not, contrary to the State's contention, put the tribes at the mercy of any and all, natural and man-made, fluctuations in the resource. The term simply differentiates between the total fish population and those fish subject to allocation under the treaty. The remainder must escape for spawning purposes in order to perpetuate the resource. *Washington—Phase I, supra* n.2, 443 U.S. at 670 n.15, 99 S.Ct. at 3067 n.15.

The Supreme Court similarly disposed of the State's argument that when the tribes signed the treaties, they bargained for both the costs and the benefits of economic development. The State suggests that the tribes entered the treaty negotiations with the understanding that the United States was encouraging non-Indian settlement of the West, that non-Indians would commercially develop the natural resources, and that the United States intended to diversify the Indian economy and acculturate the Indians into the non-Indian way of life.[62] To the contrary, it is well established that the treaty negotiators specifically assured the tribes that they could continue to fish notwithstanding the changes that the impending western expansion would certainly entail.

> "These people [Governor Stevens and his advisers] recognized the vital importance of the fisheries to the Indians and wanted to protect them from the risk that non-Indian settlers might seek to monopolize their fisheries." *Washington—Phase I, supra,* 443 U.S. at 666, 99 S.Ct. at 3064.

It has been stated repeatedly that neither party to the treaties, nor their successors in interest, may act in a manner that destroys the fishery. *See, e.g., United States v. State of Washington, supra,* 520 F.2d at 685; *Final Decision I, supra,* 384 F.Supp. at 401-402; *Confederated Tribes of the Umatilla Indian Reservation v. Alexander,* 440 F.Supp. 553 (D.Or.1977) (*"Umatilla"*). In *Umatilla,* a fishing clause substantially identical to those in question here was held to bar the construction of a dam which would have flooded some Indian fishing stations, prevented all wild fish from swimming upstream, and completely eliminated the steelhead run above the dam. Nothing short of an express congressional directive could impair the tribes' fishing right. *Id.* at 555. Conversely, the Supreme Court ruled in *Puyallup III* that the State's conservation-oriented regulation must be applied to on as well as off-reservation fishing because otherwise the tribes might frustrate

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[62]Defendants' brief on motion for partial summary judgment (Mar. 31, 1979) at 23-48.

other citizens' exercise of their fishing right. *Puyallup III, supra,* 433 U.S. at 176-177, 97 S.Ct. at 2623. The only significant difference between the holding here and prior decisions is that the general rule that neither party may impair the other's fishing right is applied to the particular situation of impairment by environmental degradation rather than by physical device,[63] by otherwise-burdened access to the fishery,[64] by discriminatory regulation,[65] or by discriminatory application of neutral regulations.[66]

[6, 7] The conclusion that the treaty-secured fishing right incorporates an environmental right is consonant with the implied-reservation-of-water doctrine that is often employed in the construction of Indian treaties. In *Winters v. United States,* 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340 (1908), the seminal case in this area, the Supreme Court held that when the treaty creating the Fort Belknap Indian Reservation was signed, the parties impliedly reserved a sufficient quantity of water to irrigate the arid reservation land. Without that water, the purpose of creating the Reservation—to enable the tribe to give up its nomadic existence and sustain itself on a relatively small tract of land—would be incapable of fulfillment. *Id.* at 576, 28 S.Ct. at 211. Thus, the construction of dams or reservoirs or the undertaking of any other activities that would prevent water from flowing to the Reservation was enjoined. *See also United States v. New Mexico,* 438 U.S. 696, 98 S.Ct. 3012, 57 L.Ed.2d 1052 (1978); *Cappaert v. United States,* 426 U.S. 128, 96 S.Ct. 2062, 48 L.Ed.2d 523 (1976); *Arizona v. California,* 373 U.S. 546, 83 S.Ct. 1468, 10 L.Ed.2d 542 (1963). For present purposes, there are two notable limitations on the implied-reservation-of-water doctrine. First, water rights may be implied only "[w]here

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[63] *United States v. Winans, supra* n.3 (re fish wheel).

[64] *Tulee v. Washington, supra* n.3 (re fishing license fee).

[65] *Puyallup II, supra* n.3 (re ban on all-Indian net fishing in favor of all-non-Indian hook-and-line fishing).

[66] *Final Decision I, supra* n.2, 384 F.Supp. at 388-399, 403-404 (re discriminatory enforcement of Washington's fishing regulations).

water is necessary to fulfill the very purposes for which a federal reservation was created," and not where it is merely "valuable for a secondary use of the reservation." *New Mexico, supra,* 438 U.S. at 702, 98 S.Ct. at 3015. However, so long as water rights are necessary to exercise expressly-reserved rights, they arise by implication regardless of the equities that may favor competing water users. *Cappaert, supra,* 426 U.S. at 138-139, 96 S.Ct. at 2069. Second, the scope of the implied right is circumscribed by the necessity that calls for its creation. The doctrine "reserves only that amount of water necessary to fulfill the purpose of the reservation, no more." *Id.* at 141, 96 S.Ct. at 2070.

In this case, there can be no doubt that one of the paramount purposes of the treaties in question was to reserve to the tribes the right to continue fishing as an economic and cultural way of life. It is equally beyond doubt that the existence of an environmentally-acceptable habitat is essential to the survival of the fish, without which the expressly-reserved right to take fish would be meaningless and valueless. Thus, it is necessary to recognize an implied environmental right in order to fulfill the purposes of the fishing clause. Indeed, courts have already recognized implied water rights for the specific purpose of preserving fish. In both *Cappaert, supra,* and *United States v. Anderson,* No. 3643 (E.D.Wash., July 23, 1979), the unimpaired flow of sufficient *quantities* of water was held to be necessary for the protection of fish located in a national monument and an Indian reservation. Here, plaintiffs claim that the treaties impliedly reserved water of sufficient *quality* to sustain the salmon and steelhead trout which they have the expressly-reserved right to take. The recognition of that implied right is no less necessary here than in *Cappaert* or *Anderson.* In fact, the fishing clause is even more crucial to the purposes of the treaties here in question than were the fish-related clauses in those cases.

The State argues at some length that it is not necessary to imply an environmental right because there currently exist numerous federal and State programs designed to protect the fish habitat. There is no dispute regarding

the existence, as opposed to the effectiveness, of those programs. However, the fact that there may be means of at least partially protecting the fish habitat does not negate the existence of the right.[67] An environmental right must be implied in order to fulfill the purposes of the fishing clause. Whether existing means of enforcing that right are adequate (as the State contends), or whether supplementary means must be adopted (as plaintiffs request), is a separate issue to be addressed at the remedial stage of this litigation.

B

The State raises the jurisprudential defense that even if the tribes' fishing right encompasses the right to environmental protection of the fish, the correlative duty associated with that right rests with the federal government and not with the State. The State invokes Hohfeldian analysis for the proposition that the nature of a "right" is best understood in relation to its jural correlative—"duty." *See* Hohfeld, *Some Fundamental Legal Conceptions As Applied In Judicial Reasoning,* 23 Yale L.J. 16, 30-34 (1913). The thrust of the late Professor Hohfeld's discussion is to refine the concept of right by distinguishing legal relations based on right from those based on privilege, power, and immunity. As enlightening as Hohfeldian analysis may be, its application to this case is elusive at best.

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[67]*Colville Confederated Tribes v. Walton,* 460 F.Supp. 1320 (E.D.Wash.1978), is not to the contrary. There, Judge Neill declined to find an implied reservation of water in order to protect Lahontan trout spawning grounds on the Colville Indian Reservation. The record established that although power and reclamation dams eliminated natural spawning grounds, a federally-operated hatchery made replacement trout available to the tribe and the tribes' fishing right was not shown to be impaired. Therefore, it was not necessary to imply an environmental right in order to fulfill the purposes for which the Colville Reservation was created. *Id.* at 1330. Here, the record establishes beyond dispute that environmental degradation has impaired the fish habitat. Moreover, there is no showing that hatchery programs have fully mitigated the resulting dimunition in the fishery. The recognition of an implied environmental right is essential to the tribes' exercise of their fishing right; the extent of such right will later be determined in light of the adequacy of existing environmental protection and artificial propagation programs.

The scope of the implied environmental right is governed by the scope of the express fishing right whose purpose it is designed to fulfill. There is no question that the duty correlative to the environmental right is similarly limited in scope. The issue raised here, which in no way implicates Hohfeldian analysis, is whether the duty correlative to the tribes' environmental right rests exclusively with the United States or whether it equally binds the State. Nowhere does Hohfeld suggest a direct correlation between the number of entities possessing a right and the number of entities subject to the duty not to violate that right.

[8] More to the point, the Supremacy Clause imposes upon the State the duty not to violate federal rights, including those secured by federal treaties. The fact that the federal government is under a comparable duty, as a party to the treaties, not to violate the tribes' environmental right does not relieve the state of its own obligations under the Supremacy Clause. As Judge Boldt expressly held in Phase I:

> "Admission of the State of Washington into the Union upon an equal footing with the original states had no effect upon the treaty rights of the Plaintiff tribes. Such admission imposed upon the State, equally with other states, the obligation to observe and carry out the provisions of treaties of the United States." *Final Decision I, supra,* 384 F.Supp. at 401.

C

[9, 10] The more difficult issues pertaining to the State's duty involve its nature and scope. Several guiding considerations emerge from the numerous cases involving disputes between states and treaty tribes. First, the treaty-secured right to take fish at usual and accustomed places may not be qualified or conditioned by the State. *Puyallup I, supra,* 391 U.S. at 398-399, 88 S.Ct. at 1728. *See also Tulee v. Washington, supra; Winans, supra; Final Decision I, supra,* 384 F.Supp. at 401. Second, the State may not subordinate the fishing right to any other objectives or purposes it may prefer.

> "It [the state] may not force treaty Indians to yield their own protected interests in order to promote the welfare of the state's other citizens." *United States v. State of Washington, supra,* 520 F.2d at 686.

See also Final Decision I, supra, 384 F.Supp. at 401-402; *Sohappy v. Smith,* 302 F.Supp. 899, 908 (D.Or.1969). Third, the State may affirmatively regulate treaty fishing solely for the purpose of conserving the resource. *Puyallup* trilogy, *supra; Final Decision I, supra,* 384 F.Supp. at 333-334, 342, 401-404; *Sohappy v. Smith, supra,* 302 F.Supp. at 908-912. It would virtually obliterate these narrowly-drawn limitations on the State's authority were this Court to rule, by denying plaintiffs' pending motion, that the State may now regulate treaty fishing for two purposes: to conserve the resource *or* to destroy it.

Unlike many of the preceding cases, this case does not (at this stage of this litigation) involve an attempt by the State affirmatively to regulate the fishery. Contrary to the State's apprehensions, neither does this case involve an attempt by plaintiffs to impose an affirmative duty on the State to protect the fish habitat. Rather, plaintiffs seek the recognition of a negative duty such that when the State exercises its broad regulatory powers it does not impair the environmental conditions necessary for the survival of the treaty fish. According to the United States:

> "[T]he duty here is the duty to *refrain* from taking or approving actions which have a significant adverse impact on the treaty right fishery. Plaintiff is not seeking any new legislation or expenditure of resources by the State. It is merely asking that the State, in carrying out its regulatory authority over public or private actions with environmental impact, not authorize actions that will significantly damage or destroy the treaty guaranteed fishery."[68]

In light of this characterization of the duty sought to be imposed, the State's claim that recognition of an environmental right will require it to make additional expendi-

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[68]Plaintiffs' response to defendants' brief on motion for summary judgment at 12 (United States' reply brief). *See also,* plaintiff tribes' reply memorandum re: plaintiffs' motion for summary judgment at 37 n.14.

tures in violation of the Tenth Amendment and *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976), is ill-founded. The State need not make any additional expenditures, the treaty right from which the State's duty arises is not based on the commerce clause,[69] and the question of the appropriate scope of any relief to be granted is not yet in issue. Moreover, the State already purports to act as if it has voluntarily assumed the very duty which it here resists.

> "The [Washington Fisheries] Department's habitat protection functions include evaluating potential effects of public or private projects or activities that may affect salmon production. Reports and recommendations concerning these activities are made to the appropriate agencies. * * *
>
> Departmental functions that relate directly to habitat protection include setting restrictions for hydraulic permits, inspecting hydraulic projects, developing recommendations regarding water right applications, and establishing fish use flows for salmon production streams. * * *
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> * * * * * *
>
> In concert with the Department of Fisheries, the Department of Game inspects and issues joint permits for hydraulic permits. * * * [A]ctivities affecting stream beds are directed to be conducted at a time and in a manner that minimize adverse effects on the stream environment for fish. The two departments review all plans for major projects affecting stream habitat and develop appropriate recommendations. All water right applications are similarly reviewed for their possible impact on fishery resources and commented upon where needed. Recently, annual logging plans of several major timber owners have come under detailed review and comment by personnel of both departments."[70]

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[69]The Supreme Court's holding in *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976), has been limited to federal attempts under the *commerce clause* to impose affirmative monetary obligations on states. *See Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 690 n.54, 98 S.Ct. 2018, 2035 n.54, 56 L.Ed.2d 611 (1978)

[70]Joint Biology Statement at 75-76, 90.

Whether the State effectively carries out these activities, and whether they are adequate, are questions to be addressed at the relief state of this litigation. For present purposes it is sufficient to note that the State has at least implicitly acknowledged that it has a duty not to impair or permit the impairment of the fish habitat.

As the parties approach the relief state, of critical concern will be the precise scope of the State's environmental duty. Plaintiffs urge the Court to hold the State to a standard of "no significant deterioration," which would preclude the State from appreciably reducing the environmental quality of the fish habitat. The State responds by arguing that the cases cited by plaintiffs do not support their position.[71] The Court finds a more fundamental flaw in plaintiffs' proposal. The "no significant deterioration" standard was articulated by courts and expressly adopted by Congress in order to effectuate the goals of various environmental statutes. *See Sierra Club v. Ruckelshaus,* 344 F.Supp. 253 (D.D.C.1972), *aff'd per curiam,* 4 E.R.C. 1815 (D.C.Cir.1972), *aff'd* by *an equally divided Court sub nom., Fri v. Sierra Club,* 412 U.S. 541, 93 S.Ct. 2770, 37 L.Ed.2d 140 (1973), 42 U.S.C. §§ 7470-7491 (1980) (re Clear Air Act, 42 U.S.C. § 7401 *et seq.*); *United States Steel Corp. v. Train,* 556 F.2d 822, 846 n.44 (7th Cir. 1977), 33 U.S.C. § 1313(c)(2) (re Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.*); *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971), 49 U.S.C. § 1653(f) (re Department of Transportation Act, 33 U.S.C. § 1651 *et seq.*); 43 U.S.C. § 1782(c) (re Federal Land Policy and Management Act, 43 U.S.C. § 1701 *et seq.*). The standard reflects Congress' legislative judgment, arrived at after weighing competing environmental and economic considerations. In each of the above-cited statutes, Congress indicated that the nondegradation standard was necessary in order to realize the statutory objectives. In contrast, here the Court rather than Con-

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[71]Having denied the existence of any environmental right or any environmental duty upon the State, the State does not propose an alternative definition of the scope of plaintiffs' asserted right.

gress is called upon to impose a nondegradation standard. It is well established that the scope of an impliedly-reserved right may not be broader than the minimal need which gives rise to the implied right. *Cappaert, supra,* 426 U.S. at 141, 96 S.Ct. at 2070. Thus, the scope of the State's environmental duty must be ascertained by examining the treaty-secured fishing right rather than by selecting a desirable standard that has been imposed by Congress in a different context.

[11] The treaties reserve to the tribes a sufficient quantity of fish to satisfy their moderate living needs, subject to a ceiling of 50 percent of the harvestable run. *Washington—Phase I, supra,* 443 U.S. at 686-687, 99 S.Ct. at 3075. That is the minimal need which gives rise to an implied right to environmental protection of the fish habitat. Therefore, the correlative duty imposed upon the State (as well as the United States and third parties) is to refrain from degrading the fish habitat to an extent that would deprive the tribes of their moderate living needs.

The tribes' treaty allocation is currently set at 50 percent of each harvestable run. *Id.* That the ceiling has been applied creates the presumption that the tribes' moderate living needs exceed 50 percent and are not being fully satisfied under the treaties. As the burden is upon the State to demonstrate to the Phase I court that the tribes' needs may be satisfied by a lesser allocation, the State must also bear the burden in Phase II to demonstrate that any environmental degradation of the fish habitat proximately caused by the State's actions (including the authorization of third parties' activities) will not impair the tribes' ability to satisfy their moderate living needs. Naturally, the plaintiffs must shoulder the initial burden of proving that the challenged action(s) will proximately cause the fish habitat to be degraded such that the rearing or production potential of the fish will be impaired or the size or quality of the run will be diminished.

V

Accordingly, IT IS HEREBY ORDERED that the

plaintiffs' motion for summary judgment on the hatchery issue is GRANTED, that the defendant's cross-motion for summary judgment on the hatchery issue is DENIED, and that the plaintiffs' motion for partial summary judgment on the environmental issue is GRANTED. Plaintiffs shall prepare and lodge with the Court by October 15, 1980, an appropriate form of order approved by defendants in accordance with the findings of fact and conclusions of law set out in this opinion.

Supreme Court, U.S.
FILED
OCT 4 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-164

IN THE

Supreme Court of the United States

October Term, 1985

STATE OF WASHINGTON, et al.,
Petitioners,

v.

UNITED STATES, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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October 3, 1985

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6 J. Moore, Moore's Federal Practice § 56.27[1] (1980) 26

10 Wright & Miller, Federal Practice and Procedure: Civil § 2716 (1983) 26

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In the

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State of Washington, et al.,

Petitioners,

v.

United States, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

The Respondent Tribes respectfully request that this Court deny the petition for certiorari seeking review of the decision of the Court of Appeals which is

reported at 759 F.2d 1353 (9th Cir. 1985).

QUESTION PRESENTED

Does the "right of taking fish," secured to certain Washington Tribes by the Stevens Treaties, include the right to take artificially-propagated hatchery fish as well as naturally-propagated fish?

STATEMENT OF THE CASE1/

The "hatchery issue" -- whether artificially-propagated fish as well as natural fish should be apportioned between treaty and non-treaty fishers under the Stevens Treaties -- is part of the continuing litigation in United States v. Wash-

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1/ The Statement of the Case in the State of Washington's Petition for Certiorari is incomplete, and fails to disclose that the Petition raises new issues not presented to the district court. The Tribes supplement it as necessary.

ington.2/ It first arose at oral argument before this Court in Washington State Game Dept. v. Puyallup Tribe (Puyallup II), 414 U.S. 44 (1973), when the State argued that, in allocating steelhead trout on the Puyallup River between Indians and non-Indians, a distinction should be drawn between hatchery and natural fish. This Court reserved decision on the issue, 414 U.S. at 48, but three concurring Justices suggested that the treaty "does not obligate the State of Washington to subsidize

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2/ United States v. State of Washington, 384 F. Supp. 312 (W.D. Wash. 1974) ("Final Decision I"), aff'd, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976); United States v. State of Washington, 459 F. Supp. 1020 (W.D. Wash. 1974-1978) ("Post-Trial Decisions"), various appeals dismissed, 573 F.2d 1117, 573 F.2d 1118, 573 F.2d 1121 (9th Cir. 1978), aff'd sub nom., Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979). These proceedings are collectively referred to as "Phase I" of United States v. Washington. The hatchery issue constitutes part of "Phase II" of the same case.

the Indian fishery with planted fish paid for by sports fishermen" over and above the annual run in the river "left to its own devices." 414 U.S. at 49-50.

The State then raised the issue in United States v. Washington, arguing that all hatchery fish should be excluded from the tribal allocations for salmon as well as steelhead. District Court Judge Boldt deferred the issue, 384 F. Supp. at 344-45, and ruled that hatchery fish should, in the meantime, be included in the tribal allocations. 384 F. Supp. at 411, 419.

Two years later, after the state court, on remand in Puyallup II, supra, ruled that hatchery steelhead on the Puyallup River should be excluded from any tribal allocation, Department of Game v. Puyallup Tribe, 86 Wn.2d 669, 548 P.2d 1058 (1976), the State unilaterally attempted to remove hatchery fish from the tribal allocations, and Judge Boldt en-

tered a preliminary injunction restraining the State from doing so. 459 F. Supp. 1072-85 (W.D. Wash. 1976), appeal dismissed, April 5, 1977, reh'g denied, May 4, 1977 (9th Cir. No. 76-3757). For each fishing season from 1974 to the present, then, both hatchery and natural fish have been included in the pool of fish apportioned between treaty and non-treaty fishers. Hatchery fish were included, of course, in the district court allocations approved by this Court in Passenger Fishing Vessel.3/

In 1976, Phase II was assigned to District Court Judge William Orrick. After detailed pre-trial and discovery proceedings, Petitioner and Respondents filed

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3/ The hatchery issue was raised again in Passenger Fishing Vessel, but this Court ruled that the district court had not yet reached a final decision on the issue and that it was therefore not fairly subsumed within the grant of certiorari. 443 U.S. at 688 n.30.

cross-motions for summary judgment on the hatchery issue. The Tribes and United States moved for a summary judgment that hatchery fish were "fish" within the meaning of the phrase, "right of taking fish," in the Stevens Treaties, and were thereby included in the allocable population of fish. The State moved to exclude from the population of allocable fish the entire "first generation" of hatchery-produced fish, whether such fish came from State, federal, tribal, private, or cooperative hatcheries. 506 F. Supp. at 197; App. B.19. The State did not argue, as it does here, that some but not all hatchery fish should be included in the allocations based on variables such as source of funding or hatchery ownership, and at oral argument before the district court the State stipulated that there were no genuine issues of material fact precluding resolution of the hatchery issue by sum-

mary judgment.4/ See Transcript of Oral Argument of April 10, 1980, at 98; 506 F. Supp. at 194 n.25, App. B.14.

The district court's decision, as affirmed on appeal, was based on the follow-

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4/ Pursuant to the Manual for Complex Litigation, Judge Orrick required the parties to exchange detailed statements of factual and legal contentions and admit or deny each of the opposing party's contentions. Judge Orrick also required the parties to prepare a joint stipulation concerning first, the percentage of hatchery-bred salmon and steelhead within the total population of salmon and steelhead in the case area for each decade from 1900 to 1980, second, the percentage of hatchery-bred salmon and steelhead released from State, federal and tribal facilities, and, third, for State-run facilities, the percentage of direct funding from the State government, from license fees, from the federal government, and from other sources. The parties were in substantial agreement as to the answers to the first two questions, and, as to the third question, the fact of federal financial assistance to state hatcheries, as opposed to the exact amount, is undisputed. App. B.18; 506 F. Supp. at 196-97 n.31. For purposes of the summary judgment motions, Judge Orrick accepted the State version of the stipulation wherever there was disagreement with the Tribes concerning the precise figures. Id.

ing uncontroverted facts set forth in the affidavits accompanying the cross-motions for summary judgment, the admissions contained in the proposed stipulations, and certain stipulations filed in Phase I: First, although salmon and steelhead once abounded in the Pacific Northwest, urbanization and intensive development of the case area, including dams, extensive logging operations, and pollution of the watersheds, have "reduced the quality and amount of accessible spawning grounds . . . [and] reduced the rearing capacity of the streams." Joint Biology Statement at 20, 78, 506 F. Supp. at 203, App. B.31. As Judge Orrick put it:

> It is now beyond dispute that natural fish have become relatively scarce, due at least in part to the commercialization of the fishing industry and the degradation of the fishing habitat caused primarily by non-Indian activity in the case area.

506 F. Supp. at 198, App. B.20. See also

Passenger Fishing Vessel, 443 U.S. at 668-69. The State's hatchery program (and the hatchery programs conducted by the United States and the Tribes) have been developed "in order to replace the fish that were artificially lost." 506 F. Supp. at 198, App. B.21. As the Court of Appeals summarized, hatcheries "are designed essentially to replace natural fish lost to non-Indian degradation of the habitat and commercialization of the fishing industry." 759 F.2d at 1360; App. A.12.5/

5/ The State describes its hatchery programs as

> a means of combating losses of fish life caused by environmental changes. They are an aid to crippled streams in producing fish, occasionally a substitute for them. Because of competitive water, land and forest exploitation, it has been necessary to develop controlled methods of sustaining or rehabilitating the stocks of fish which inhabit freshwater streams.

506 F. Supp. at 198, App. B.21., quoting a State publication entitled "Salmon Hatcheries." And: "Hatcheries are intended to replace the production of streams de-

Second, although the percentage of hatchery fish varies from run to run and species to species, hatchery fish constitute a substantial and growing proportion of the total case area fish population. 506 F. Supp. at 198, App. B.21. For example, the percentage of hatchery-bred steelhead increased from 10 percent in 1950 to 60 percent by 1980. Id. On some steelhead runs, 90 percent of the catch is of hatchery origin, and the ratio of wild fish to hatchery fish is expected to continue to decline. Id. During the 1978-79 season, hatchery fish constituted, on the average,6/ approximately 17 percent of the

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stroyed by dams, diversions, pollution or obstructions, and to build up the runs and streams that are not producing to full capacity." Id., referring to State documents quoted in the Affidavit of Howard Droker at 5.

6/ The proportion of hatchery fish fluctuates each year because of variations in the size of the natural runs, variations in the number of hatchery fish re-

salmon in the case area, 506 F. Supp. at 197; App. B.19, but because there are virtually no hatchery-propagated pink and sockeye salmon and those runs are the most numerous and contain the smallest fish,7/ the 17 percent figure does not accurately reflect the real significance of hatchery fish to the treaty allocations. Of the much larger and more valuable species such as chinook, coho and chum, the percentage of hatchery fish is much larger. For example, in 1978-79, approximately 63 percent of the chinook in the case area were of hatchery origin. 506 F. Supp. at 197,

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leased, and other factors. In addition, the predominantly natural pink runs occur only every other year, causing further variations.

7/ Sockeye salmon average 5 to 6 pounds and pink salmon average 4 or 5 pounds. Chinook average 15 to 20 pounds.

App. B.19.8/

Because salmon return to their native streams to spawn, the placement of hatcheries has a significant and distinct impact on the proportion of hatchery and natural fish in each geographically separate usual and accustomed fishing area. 506 F. Supp. at 197, App. B.19. If hatchery fish were excluded from the allocations, each Tribe would therefore be affected differently. For example, most of the predominantly natural pink and sockeye runs pass only through North Puget Sound waters. South Sound runs are more predom-

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8/ Looking at Puget Sound origin runs for the 1978-79 season, 79.4 percent of the chinook, 73.3 percent of the coho, and 23.5 percent of the chum are hatchery fish. Attachment No. 1 to State Proposed Stipulation, CR 6981.

inantly of hatchery-origin chinook, coho and chum.

Third, the Tribes, the United States, and private parties operate hatcheries which contribute substantially to the total hatchery fish population.9/ The State and the Tribes also operate a number of hatchery projects as cooperative joint ventures.

Fourth, the United States provides substantial financial support for State-operated hatcheries. Although the exact percentage of funding from federal sources used to support case area hatcheries is not established, the fact of such support

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9/ According to State figures, federal, tribal, private and cooperative hatcheries accounted for approximately 25 percent of the hatchery-bred steelhead and 22 percent of the hatchery-bred salmon released in the case area in the 1978-79 season. 506 F. Supp. at 202, App. B.28. Again, the proportion varies for each year, for each species, and for each geographic area within the case area.

is undisputed. See 506 F. Supp. at 196 nn.30-31; App. B.18-19; note 4, supra.10/

Fifth, hatchery and natural stocks of the same species occupy the same harvest management area at the same time, and

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10/ In response to Respondent's interrogatories concerning the proportions of State, federal and state license funding of hatchery facilities, the State replied that such information was available only on a statewide basis and was generally unavailable for the case area. In response to Judge Orrick's request for a stipulation, however, the State reported that for FY 1978-79, 39.2 percent of the operation and maintenance costs for state steelhead facilities came directly from the federal government. State Proposed Stipulation at 4.

Funding varies from hatchery to hatchery and is subject to manipulation by the State. One State employee testified that of two hatcheries using brood stock from the Chambers Creek steelhead facility, one was 100 percent State-funded while the other was 50 percent federally-funded. Only steelhead from the State-funded facility were planted in the Puyallup River, while steelhead from the facility receiving federal funds were planted elsewhere in the case area. Deposition of Arthur Westrope, April 4, 1978, at 60. The Tribes believe this was done in the hope of influencing the outcome of the Puyallup litigation.

compete with one another for food and space. To individual fishermen, hatchery and natural fish resemble one another and there has been no demonstration presented in the record that "reasonably accurate or economically feasible" techniques are available to differentiate between them, particularly as they migrate through mixed stock areas where various runs commingle. See 506 F. Supp. 197, App. B.19.

The district court held that hatchery fish should be included in the allocable pool of fish, and the Ninth Circuit Court of Appeals affirmed, noting that the federal government and Tribes directly and indirectly contributed to the population of hatchery fish, and that, in any event, "to allow the source of funding to determine rights would permit the State to buy out treaty fishing rights, not by paying the Tribes, but rather by paying for the replacement of the treaty-protected fish

with unprotected fish . . . . " 759 F.2d at 1359, App. A.12. Noting the mitigation purposes of hatcheries, the Court of Appeals concluded:

> Under those circumstances, it is only just to consider such replacement fish as subject to treaty allocation. For the Tribes to bear the full burden of the decline caused by their non-Indian neighbors without sharing the replacement achieved through the hatcheries, would be an inequity and inconsistent with the treaty.

759 F.2d at 1360; App. A.12-13.11/

REASONS WHY THE WRIT SHOULD BE DENIED

1. The Decision of the Court of Appeals Does Not Conflict With Any Decision of This Court or of Any Court of Appeals.

The State of Washington in its Petition argues that this Court has recognized

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11/ Although two petitions for en banc rehearing were granted by the court below, they did not concern the hatchery issue. Ten Judges concurred in the hatchery ruling, and the eleventh judge dissented on a procedural issue not raised in the petition.

the existence of a "hatchery fish issue" in Puyallup II, supra, Washington State Game Dept. v. Puyallup Tribe (Puyallup III), 443 U.S. 165 (1979), and Passenger Fishing Vessel, but the State fails to demonstrate any conflict of decision supporting review by this Court under Supreme Court Rule 17.1(a) or (c). None of the decisions in the Puyallup trilogy address the governing law or the complex biological and economic factors upon which the lower courts' analyses were hinged,12/ and Passenger Fishing Vessel supports a conclusion opposite from that the State advances.

12/ See particularly, United States v. Washington (Post-Trial Decisions), 459 F. Supp. 1020, 1079 (W.D. Wash. 1976), for a catalog of relevant considerations that were not included in the Puyallup record, such as the mitigation function of the State hatcheries, the presence of federal and tribal hatchery programs, the fact of substantial federal assistance for State hatchery programs, and the fact that it was not demonstrated what the Puyallup River "left to its own devices" would produce.

a. This Court's Reasoning in Passenger Fishing Vessel Strongly Supports the Analysis Below.

As Judge Orrick explained:

> The inescapable conclusion is that if hatchery fish were to be excluded from the allocation, the Indians' treaty-secured right to an adequate supply of fish -- the right for which they traded millions of acres of valuable land and resources -- would be placed in jeopardy. The Tribes' share would steadily dwindle and the paramount purpose of the treaties would be subverted. Contrary to what the Supreme Court held to be the parties' intentions, non-treaty fishermen would ultimately "crowd the Indians out of any meaningful use of their accustomed places to fish.

506 F. Supp. at 198-99; App. B.22 (citing Passenger Fishing Vessel, 443 U.S. at 676-677). The Court of Appeals, while not accepting all of Judge Orrick's reasoning, concluded:

> . . . Fishing Vessel's holding that the Tribes are entitled under the treaty to an "adequate supply of fish" supports the inclusion of hatchery fish in the allocation . . . This limitation [the 50 percent ceiling] on the amount of fish allocable to the Tribes highlights the need to

> permit them to share equitably in the hatchery fish.

759 F.2d at 1359; App. A.11-12.13/ No conflict with this Court's ruling is presented.

The State's argument that hatchery fish should be excluded from the tribal allocations because such fish were not in existence when the treaties were negotiated is foreclosed by this Court's holding in Passenger Fishing Vessel. The treaties reserved not particular fish but rather a meaningful "right of taking fish," 443 U.S. at 678 (emphasis in original), so as to meet the Indians' "subsistence and com-

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13/ Although this Court's decision in Passenger Fishing Vessel provided a mechanism to reduce the Tribes' allocation upon a showing that fewer fish were needed to meet the Tribes' moderate living needs, see 443 U.S. at 686-87, the State has not so moved. At oral argument before the Court of Appeals below, the State conceded that the Tribes' moderate living needs were not being exceeded by the 50 percent allocation.

mercial needs." 443 U.S. at 679. That the need for hatcheries to replace lost wild fish was unforeseen is no more relevant than that the need for allocation was unforeseen; to give effect to the treaties today, hatchery as well as wild fish must be fairly apportioned.14/

14/ The State also argues that it has "created" new runs that did not historically exist, and augumented runs beyond their natural capacity. Petition at 6, 7. To the very limited extent that that is true, it is only because the State has sometimes chosen to locate hatcheries in geographic areas where natural barriers prevent migration of wild fish or where rearing capacity is limited due to the size of the creek. Such fish are harvested over a wide area, however, and do not diminish the overall mitigative function of hatcheries. Nor should they cloud the reality that hatcheries have failed to reestablish the condition of plentitude that existed at treaty times in the case area. Unfortunately, looking at the case area as a whole, the resource that was once plentiful, "has now become scarce." 443 U.S. at 669.

b. The Decision Below Does Not Conflict With This Court's Decision in New Mexico v. Mescalero Apache Tribe.

In New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983), this Court noted that "New Mexico does not contribute in any significant respect to the maintenance of [on-reservation fish and game] resources," and that the fish and game were either native or created by joint efforts of the Tribe and the Federal Government. 462 U.S. at 342. The Court concluded that New Mexico did not assert a sufficient governmental interest to justify concurrent on-reservation jurisdiction over fish and game. The State attempts to argue here that Mescalero's reference to "certain factors such as location and funding" provides "guidelines" which should govern allocation of hatchery fish under the Stevens Treaties. These factors, the

State argues, were "glossed over" by the district court. Petition at 4.

The issue in Phase II, as in Phase I, however, is not jurisdiction, but allocation -- whether the State may exclude the Tribes from participation in the harvest of hatchery fish. The Tribes do not dispute that the State has jurisdiction to regulate the taking of hatchery fish by Indians just as it does for native fish, subject to appropriate standards, when it is reasonable and necessary for conservation of the species. See Passenger Fishing Vessel, 443 U.S. at 682 (citing Puyallup I, 391 U.S. at 398, 402); see also Antoine v. Washington, 420 U.S. 194, 207-08 (1975). The State asserts here no legitimate conservation interest in hatchery fish; it seeks only to exclude them from the allocations so as to benefit its non-treaty constituency. This Court has not permitted it to allocate natural

fish to the exclusion of the Tribes, and neither Mescalero nor other authority suggests it should be permitted to do so with hatchery fish that replace them.

The record below also belies the State's assertion that the district court or Court of Appeals "glossed over" such factors as funding. As described in the Statement of the Case, both courts explicitly noted that federal financial support of state hatchery programs was undisputed and that substantial federal, tribal and cooperative hatchery programs contributed to the overall population of hatchery fish. Given these factors, and in light of the mitigative purpose of hatchery programs and the practical effect of excluding a steadily increasing proportion of the runs from the treaty allocation, the courts ruled that consistent with federal law, the State could not buy its way

out of its treaty obligation. 759 F.2d at 1359, App. A.12.

2. The Hatchery Issue Is Not An Important Issue of Federal Law Which Should Be Decided by This Court Under Supreme Court Rule 17.1(c).

The hatchery issue, although of paramount practical significance to the Tribes, does not present an important question of federal law. No similar issue is being litigated elsewhere, and the decision below will not substantially affect persons not parties to this litigation. Unlike Passenger Fishing Vessel, no law enforcement crisis is presented, no conflict in decision between state and federal courts exists,15/ and there is no over-

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15/ Hatchery fish have been included in the allocations since 1974, and in 1979, on remand from this Court, the Washington State Supreme Court held that the federal injunction regarding hatchery fish would be honored by the state courts and the issue resolved in federal court. See Puget Sound Gillnetters v. Moos, 92 Wn.2d

riding need for Supreme Court review. Compare Passenger Fishing Vessel, 443 U.S. at 674.

3. The Position the State Seeks to Advance Before This Court Was Not Presented Below to the District Court.

Before the district court, the State stipulated that no genuine issue of material fact was presented by either the Tribes' and Federal Government's or State's motions for summary judgment. 506 F. Supp. at 194 n.25; App. B.14. The State argued below that all hatchery fish should be excluded from the allocation, not that hatchery fish should be allocated based on funding source or other variables. See Statement of the Case,

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939, 953-54 (1979). That holding has been extended to the Puyallup River as well as to the rest of the case area.

supra.16/ An appellant may not overturn a summary judgment by raising in the appellate court an issue of fact that was not plainly disclosed in the trial court,17/ and the issue should not be considered by this Court.

16/ Although the State now argues that hatchery fish can be segregated from natural fish, the State failed to make any such showing below. See 359 F.2d at 1359, App. A.12; 509 F. Supp. at 197, App. B.19. The State now also argues that funding sources are identifiable, but the State's answers to the Tribes' and United States' interrogatories declined to identify sources of funding on the ground that records were not kept on a hatchery-by-hatchery or case-area basis. See note 9, supra.

17/ De Bardeleban v. Cummings, 453 F.2d 320 (5th Cir. 1972); Halstead & Mitchell Co. v. United Steel Workers of America, 421 F.2d 1191 (3d Cir. 1969); 6 Moore's Federal Practice, § 56.27[1] at 56-57 (1980); 10 Wright & Miller, Federal Practice and Procedure: Civil § 2716 at 650-54 (1983) and numerous cases cited. See also Adickes v. Kress & Co., 398 U.S. 144, 147 n.2.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Dated October 3, 1985.

Respectfully submitted,

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No. 85-164

In the Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF WASHINGTON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, under the language of six treaties between the United States and various Indian tribes, artificially-reared hatchery fish released into public waters to replace natural fish lost due to development of the waterways are included in the harvestable fishery base that is divided between treaty and non-treaty fishers pursuant to this Court's decision in *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n,* 443 U.S. 658 (1979).

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OPINIONS BELOW

The opinion of the district court (Pet. App. B1-B41) is reported at 506 F. Supp. 187. The opinion of the en banc court of appeals (Pet. App. A1-A34) is reported at 759 F.2d 1353. An earlier opinion of a panel of the court of appeals, reported at 694 F.2d 1374, was vacated by the en banc court.

JURISDICTION

The judgment of the en banc court of appeals was entered on April 29, 1985. The petition for a writ of certiorari was filed on July 26, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 1854 and 1855, the United States negotiated six treaties (the "Stevens treaties") with various Indian tribes residing within the boundaries of the then-Territory of Washington. The Indians traded their interest in the land west of the

Cascade Mountains and north of the Columbia River in exchange for reservations, cash payments, and various guarantees, including the right to continue fishing. Each treaty, in substantially identical terms, provides:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: *Provided, however,* That they shall not take shell fish from any beds staked or cultivated by citizens.

Treaty of Dec. 26, 1854 (Medicine Creek), United States-Nisquallys Indians, art. 3, 10 Stat. 1133; see also Treaty of Jan. 22, 1855 (Point Elliott), United States-Dwamish Indians, 12 Stat. 927; Treaty of Jan. 26, 1855 (Point No Point), United States—S'Kallams Indians, 12 Stat. 933; Treaty of Jan. 31, 1855 (Neah Bay), United States-Makah Tribe, 12 Stat. 939; Treaty of June 9, 1855 (Yakimas), United States-Yakama Indians, 12 Stat. 951; Treaty of July 1, 1855 and Jan. 25, 1856 (Olympia), United States-Quinailt and Quillehute Indians, 12 Stat. 971.

For years following execution of the treaties, preservation of fish stocks had been successfully accomplished by the customs and practices of the Indian tribes. The fishery base continued in abundance until overfishing and non-Indian activities, including industrial, agricultural, municipal, residential, and other development that causes pollution and has an adverse impact on aquatic life, began to deplete the fish stocks. Much of the destruction and alteration of fish habitat occurred pursuant to explicit state administrative authorizations. Not the least among these state-authorized activities was the substantial growth of the

non-Indian commercial fishing industry and the expanding non-Indian sport fishery. Pet. App. A12, B10, B20-B21.

In an effort to combat the depletion of the fishery base attributable to overfishing and environmental degradation, the State of Washington has placed or allowed to be placed in the waters of the case area anadromous fish that have been artificially reared and planted (Pet. App. B20-B21). Because of the significant damage and diminution of natural anadromous fish runs since the time of the treaties, and because such diminution has resulted from non-Indian activity, the tribes have sought, under the treaties, to harvest their share of all fish stocks that occur at their usual and accustomed places, without regard to whether any particular fish was reared in a natural setting or in a state, federal, or tribal hatchery.

The extent of the Indians' off-reservation fishing rights under the six treaties has been hotly debated for years by the tribes and the State of Washington. In 1970, the United States, on its own behalf and as trustee for the affected tribes, brought suit seeking a declaratory judgment and injunctive relief to define the parameters of and enforce the fishing rights clauses of the treaties. The case was litigated in two phases. This Court eventually decided Phase I of the litigation, holding that the tribes had a right under the treaties to take the lesser of 50% of the fishery base or a quantity sufficient to provide the tribes with a moderate standard of living. *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 685-687 (1979) [hereinafter cited as *Fishing Vessel*]. The Court declined to decide whether hatchery fish should be included in the fishery base because the district court had not yet reached a final decision on that issue. *Id.* at 689 n.30.

Phase II of the litigation itself involved two distinct components—the "environmental issue" and the "hatchery fish issue." With respect to the environmental issue, the

district court ruled that the treaties granting the Indians "a right of taking fish" impose upon the State of Washington a duty to refrain from taking actions or authorizing others to take actions that substantially impact upon environmental conditions in state-regulated waters so as to prevent the tribes from making a moderate living from fishing (Pet. App. B29-B40). On the hatchery fish issue, the district court ruled that the Indian treaty right extends to all fish taken in the tribes' historic fishing areas, including those released into public waters from state-operated hatcheries (*id.* at B15-B29).

The en banc court of appeals vacated the district court's judgment on the environmental issue, concluding that the necessary predicates for a declaratory judgment had not been met (Pet. App. A7-A9). (The petition does not present any questions concerning the environmental issue.) The en banc court of appeals affirmed the district court's judgment on the hatchery fish issue, holding that the district court correctly concluded that equitable considerations and *Fishing Vessel*'s holding that the tribes are entitled under the treaties to an "adequate supply of fish" supports the inclusion of hatchery fish in the allocation (Pet. App. A9-A13).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Indeed, the court of appeals' decision is entirely consistent with the principles set forth by this Court in *Fishing Vessel*. Accordingly, further review by this Court is not warranted.

1. The Court has consistently held that, in construing Indian treaty rights, legal technicalities should be avoided, and ambiguities and questions of interpretation should be resolved in favor of the Indians. See, *e.g.*, *Fishing Vessel*,

443 U.S. at 676; *Tulee* v. *Washington,* 315 U.S. 681, 684-685 (1942); *Seufert Brothers Co.* v. *United States,* 249 U.S. 194, 198 (1919); *United States* v. *Winans,* 198 U.S. 371, 380-381 (1905); *Jones* v. *Meehan,* 175 U.S. 1, 11 (1899). Against this backdrop, the court of appeals concluded that hatchery fish should be equally available to Indians and non-Indians. As the district court noted (Pet. App. B20), this Court determined in *Fishing Vessel* that the Indians are entitled to an "adequate supply of fish." Due to diminution of the fishery base by non-Indian activities, an adequate supply of fish can be had only if hatchery fish are included in the fishery base. Hatchery programs were initiated to replace losses caused by man-made deterioration of the fishery habitat (Pet. App. B20-B21). Hatchery fish now account for up to 90% of some anadromous fish runs (*id.* at B22). Furthermore, the trend in recent years has been toward an increasing percentage of the catch consisting of hatchery fish (*id.* at B21). Given these undisputed realities, permitting the tribes to take only a steadily diminishing supply of natural fish could effectively operate to deny them access to their fair share of the resource just as surely as the so-called "equal opportunity" approach rejected in *Fishing Vessel,* 443 U.S. at 676-678. As the Court there stated (*Fishing Vessel,* 443 U.S. at 676 (footnote omitted)):

> Governor Stevens and his associates were well aware of the "sense" in which the Indians were likely to view assurances regarding their fishing rights. During the negotiations, the vital importance of the fish to the Indians was repeatedly emphasized by both sides, and the Governor's promises that the treaties would protect that source of food and commerce were crucial in obtaining the Indians' assent. * * * It is absolutely clear, as Governor Stevens himself said, that neither he nor the Indians intended that the latter "should be excluded from their ancient fisheries," * * * and it is

> accordingly inconceivable that either party deliberately agreed to authorize future settlers to crowd the Indians out of any meaningful use of their accustomed places to fish. That each individual Indian would share an "equal opportunity" with thousands of newly arrived individual settlers is totally foreign to the spirit of the negotiations.

The court of appeals' ruling on the hatchery fish issue necessarily follows from this observation.

2. Petitioners nevertheless quote (Pet. 5) from Justice White's concurring opinion in *Washington State Game Dep't* v. *Puyallup Tribe,* 414 U.S. 44 (1973), in an attempt to establish that the State had no obligation to supply hatchery fish for Indian use, and, therefore, the State retains all rights in the fish. In a similar vein, petitioners analogize their situation to that of a property owner who creates new waters not previously available to the public and can continue to hold rights to the use of those waters against the general public (Pet. 7). See, *e.g., Kaiser Aetna* v. *United States,* 444 U.S. 164 (1979). Neither argument advances petitioners' cause.

First, although Justice White observed that "the State of Washington [is not obligated] to subsidize the Indian fishery with planted fish paid for by sports fishermen" (414 U.S. at 49), he did recognize that the Indian treaty rights extend to the amount of fish that would have been present had the river been "left to its own devices" (*ibid.*). As found by the district court and affirmed by the court of appeals, the hatchery fish are a replacement for diminution of the fishery base as it would have existed had the State not allowed commercial development, sports programs, and other man-caused destruction of the fishery base. Pet. App. A12-A13, B20-B21 & n.40. See also *Fishing Vessel,* 443 U.S. at 668-669 & nn.13-14. Indeed, it is ironic that the State of

Washington now claims an exclusive interest in hatchery-propagated fish. Prior to 1973, the State made no distinction between hatchery fish and natural fish (Pet. App. A12). From the inception of hatchery programs in 1895, the fish produced thereby have been considered replacements for natural fish lost due to non-Indian degradation of the habitat and commercialization of the fishing industry (*id.* at B21). The Indians should share in the replacement for the original resource as they would have shared in the original.

Second, petitioners argue (Pet. 5-6) that the entity creating the fishery base should have superior rights to the resource. The case cited in support of this proposition, *New Mexico* v. *Mescalero Apache Tribe,* 462 U.S. 324 (1983), is completely inapposite. Contrary to petitioners' assertion, the Court's "critical concern was [not] with who was responsible for the creation of the fishery" (Pet. 5). Instead, the Court held only that the Indian interest in reservation lands—a federally created interest—was superior to the state interest in regulating hunting and fishing. Indeed, the Court recognized that "[s]tate jurisdiction is pre-empted by the operation of federal law if it interferes or is incompatible with federal law and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority." *New Mexico* v. *Mescalero Apache Tribe,* 462 U.S. at 334. Here, there is a strong federal interest in the Indians' treaty right to take fish necessary to their livelihood. The treaties bind the State of Washington under the Supremacy Clause, U.S. Const. Art. VI, Cl. 2, which imposes upon the State the obligation to carry out the purposes of the treaties.

Petitioners also argue (Pet. 7) that the State somehow retains "a strong jurisdictional interest" over the hatchery fish, giving it authority to regulate those resources. But the Court in *Fishing Vessel,* 443 U.S. at 684-685, stated:

> Nontreaty fishermen may not rely on property law concepts, devices such as the fish wheel, license fees, or general regulations to deprive the Indians of a fair share of the relevant runs of anadromous fish in the case area. Nor may treaty fishermen rely on their exclusive right of access to the reservations to destroy the rights of other "citizens of the Territory." Both sides have a right, secured by treaty, to take a fair share of the available fish. That, we think, is what the parties to the treaty intended when they secured to the Indians the right of taking fish in common with other citizens.

The Indians cannot obtain their fair share of the fishery if the State can, by its practices, allow the diminution of the fishery base and then, when it establishes hatcheries to bring the base back up to acceptable levels, exclude the Indians from taking a fair share of those fish "in common with all citizens of the Territory." Free-swimming fish in public waters are *ferae nature* and the property of no one. 2 W. Blackstone, Commentaries* 411. The State's interest in them is therefore regulatory rather than proprietary. *Hughes* v. *Oklahoma,* 441 U.S. 322, 334-335 (1979); *Douglas* v. *Seacoast Products, Inc.,* 431 U.S. 265, 284 (1977). As such, state authority over the Indian fishery lies solely in the area of conservation. *Fishing Vessel,* 443 U.S. at 682 n.25; *Tulee* v. *Washington,* 315 U.S. at 684.

Commonwealth v. *Perley,* 130 Mass. 469 (1881), cited by petitioners (Pet. 7) for the proposition that the State stands in a different position from private parties who release hatchery fish, is instructive in this regard. In *Perley,* the court stated (130 Mass. at 471 (emphasis added)):

> The absolute ownership created by the statute necessarily exists only where and so long as he who propagates or cultivates the fish keeps them within a territory over which he has *absolute control;* as soon as he permits them to pass into territory where others have

> rights of fishery, equal to or greater than his, his ownership is gone, because they may then be rightfully taken by others without his consent. The right of fishery which one has in waters where the fishery is otherwise public or unprotected by statute is not affected by the fact that another, who has a like right, has seen fit to propagate fishes artificially in the waters.

The State here stands on no different footing from others who release hatchery fish into public waters. Both have relinquished all control over the fish. The State lacks "absolute control" over the waters, since the waters are subject to the six treaties. Further, it has already been established that the State does not have a proprietary interest in fish swimming in public waters. *Hughes* v. *Oklahoma,* 441 U.S. at 334-335; *Douglas* v. *Seacoast Products, Inc.,* 431 U.S. at 284. The Indians, therefore, can take hatchery fish as well as natural fish under their rights granted by the treaties.

As already noted, petitioners' analogy to the developed waters doctrine does not apply here. First, the hatchery fish were meant as a replacement for the loss of natural fish due to non-Indian causes and not as an addition to the existing fishery base. Second, in the cases applying the developed waters doctrine, a private right was transformed into something susceptible of public use, but was still held privately. Here, the State released the allegedly privately-owned fish into public waterways for public use. No attempt has ever been made to hold the hatchery fish separate from all others. The hatchery fish are in the same waters as the natural fish and, biologically, the two types of fish are virtually indistinguishable. Clearly, the hatchery fish were never intended to be kept from public consumption which, under the treaties, includes reasonable Indian harvesting.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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